No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BARBARA ALLEN BABCOCK,
Acting Assistant Attorney General,

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the Secretary of Defense, the Director of the Defense Supply Agency, the Director of the Office of Federal Contract Compliance Programs, and the Secretary of Labor, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these cases.[1]

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[1] Nine separate cases were decided in the single opinion of the court of appeals: *Westinghouse Electric Corporation, et al.* v. *Schlesinger, et al.*, Nos. 74-1801, 74-1802, 74-1803, 74-2047, and 74-2048; *United States Steel Corporation* v. *Schlesinger, et al.*, Nos. 75-1268 and 75-1269; *General Motors Corporation* v. *Schlesinger, et al.*, Nos. 75-1270 and 75-1271. Judgments adverse to the federal parties were entered in Nos. 74-1801, 74-2048, 75-1269, and 75-1271. Review is hereby sought in the latter four cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-57a) is reported at 542 F.2d 1190. The opinion of the district court in *Westinghouse Electric Corporation, et al.* v. *Schlesinger, et al.* (App. B, *infra*, pp. 58a-69a) is reported at 392 F. Supp. 1246; the opinion of the district court in the consolidated cases of *United States Steel Corporation* v. *Schlesinger, et al.*, and *General Motors Corporation* v. *Schlesinger, et al.* (App. C, *infra*, pp. 70a-73a) is unreported.

JURISDICTION

The judgments of the court of appeals (App. D, *infra*, pp. 74a-80a) were entered on September 30, 1976. On December 22, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 28, 1977, and on January 21, 1977, he further extended the time for filing a petition to and including February 27, 1977 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government, pursuant to regulations, may disclose information that is exempt from mandatory disclosure under the Freedom of Information Act and that is of the character described in 18 U.S.C. 1905.

2. Whether judicial review of an agency's decision to disclose information pursuant to the regulations is limited to review of the administrative record for abuse of discretion.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, as well as 18 U.S.C. 1905 and the pertinent regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-40, are set forth at App. E, *infra*, pp. 81a-87a.

STATEMENT

1. Respondents, Westinghouse Electric Corporation (and its subsidiary, Fraser & Johnston Company), United States Steel Corporation, and General Motors Corporation, are government contractors.[2] As a condition of doing business with the government, they are required by executive order and regulations promulgated thereunder by the Secretary of Labor to employ and treat all employees without regard to race, color, religion, sex, or national origin, and to take affirmative action to eliminate discriminatory employment practices. Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303 (see 3 C.F.R. 169, 171-172); 41 C.F.R. 60-1.4. To aid in monitoring compliance with these requirements, every contractor and subcontractor with fifty or more employees and a contract valued at $50,000 or more is required by regulation to prepare and file an annual Employer Information Report, known as an EEO-1 report. 41 C.F.R. 60-1.7(a). These reports contain data on the number of women and members of minority groups employed by the contractor. In addition, the

[2] The statement of facts, which are not in dispute, is based upon the separate joint appendices in the court of appeals.

contractor or subcontractor must prepare and make available for agency inspection an Affirmative Action Program ("AAP"), in which the contractor is required to provide detailed information on the past and projected employment of women and minority group members. 41 C.F.R. 60-1.40, 60-2.1, 60-60.2(a).[3]

The Secretary of Labor has delegated administrative responsibility under these regulations to the Director of the Office of Federal Contract Compliance Programs ("OFCCP"). 41 C.F.R. 60-1.2.[4] In turn, the Director has designated various federal agencies as "compliance agencies" and has delegated to each of them primary responsibility for assuring adherence to the equal employment opportunity program by contractors within certain geographical areas or industrial classifications. See 41 C.F.R. 60-1.6. See also OFCCP Compliance Manual, § 2-202.

The regulations promulgated by the Secretary of Labor contain rules providing for public access to information from records of the OFCCP or its various

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[3] AAP's must contain data pertinent to two general categories: (1) a "utilization analysis," which describes the occupational levels of minority personnel employed by the company, and (2) the "establishment of goals and time tables" by which opportunities for minority group members can be improved within the company. 41 C.F.R. 60-2.10. Failure of a contractor to develop an AAP, or to make a good faith effort to adhere to the policy of equal opportunity employment, can result in the cancellation, termination or suspension of the contract. 41 C.F.R. 60-1.24, 60-2.2.

[4] The OFCCP is the successor agency to the President's Committee on Equal Employment Opportunity. In Executive Order 11246, the Committee was abolished and its functions transferred to the Secretary of Labor. 30 Fed. Reg. 12319. The Secretary, in turn, established the OFCCP to carry out his responsibilities. 30 Fed. Reg. 13441.

compliance agencies. 41 C.F.R. Part 60-40 (App. E, *infra,* pp. 83a-87a). The regulations are designed explicitly to "implement * * * the Freedom of Information Act" and to give effect to "the policy of the OFCC[P] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. 60-40.1. As a general guideline for the implementation of this policy, the regulations provide that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act], if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. 60-40.2(a).

Under this general guideline, the Secretary of Labor has determined that, upon request, "* * * [EEO-1 reports] which [are] submitted by contractors to the OFCC[P] [or] a compliance agency * * * shall be disclosed." 41 C.F.R. 60-40.4. The Secretary also has determined that affirmative action plans generally "must be disclosed." 41 C.F.R. 60-40.2(b)(1). But the regulations contain exceptions for two specified portions of AAP's, which "should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of [OFCCP's or the compliance agencies'] functions." 41 C.F.R. 60-40.3(a). The por-

tions of AAP's that are subject to withholding include "goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts and changes in his personnel requirements and he has not made this information available to the public" (41 C.F.R. 60-40.3(a)(1)) and "information on staffing patterns and pay scales but only to the extent that [its] release would [*inter alia*] injure the business or financial position of the contractor * * *" (41 C.F.R. 60-40.3(a)(2)). These portions of AAP's are to be withheld as provided in the regulations, but "only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld." 41 C.F.R. 60-40.3 (a)(1).

2. The compliance agency for all of the respondents here is the Defense Supply Agency (DSA), a component of the Department of Defense. In 1973, DSA received requests from various members of the public for the disclosure of certain EEO-1's and AAP's submitted to the agency by respondents.[5] The proceedings

[5] A request for the 1972 EEO-1 for respondent Westinghouse Electric's facility in East Pittsburgh, Pennsylvania, was filed by Concerned Workers (a public interest group); a request for the 1972 AAP of respondent Fraser & Johnston Company, a wholly-owned subsidiary of Westinghouse Electric, was submitted by the Legal Aid Society of Alameda County. A disclosure request for various AAP's and EEO-1's of respondent General Motors was submitted by Reuben Robertson, III, and separate disclosure requests for the EEO-1's and AAP's filed by respondent United States Steel were made by the Commission for Human Relations of Gary, Indiana, and by James Davis, Chairman, Civil Rights Commission, Local Union 1462, United Steelworkers Union, on behalf of the Youngstown Urban League.

with respect to each request followed the same general pattern. Each respondent was advised that a request for disclosure of its AAP's and EEO-1's had been received and was given the opportunity to demonstrate, prior to release, that any portion of the documents should not be disclosed. DSA requested that respondents submit detailed reasons to support any claim that the information should be withheld.

Respondents submitted objections to disclosure, each claiming essentially that the documents should be withheld because they contained confidential corporate proprietary information, the release of which would adversely affect their business interests. After reviewing respondents' submissions, DSA concluded that disclosure of most of the information requested was warranted under OFCCP's disclosure regulations, 41 C.F.R. Part 60-40. Specifically, DSA determined that disclosure of the EEO-1 reports was required by 41 C.F.R. 60-40.4 and that disclosure of substantial portions of the AAP's was required by 41 C.F.R. 60-40.2 (b)(1). DSA concluded, however, that certain portions of the AAP's should be withheld from disclosure under 41 C.F.R. 60-40.3(a).[6]

Before any information was released, respondents were given further opportunity to convince the agency

[6] In general, the proposed deletions concerned wage data, salary rates, promotion analyses that would identify individual employees, projections of hiring or lay-off rates that would indicate substantial changes in business patterns, and the reasons for terminating the employment of specific individuals.

to withhold disclosure. After considering additional submissions and, in some cases, meeting directly with representatives of respondents, DSA made its final determination to disclose.

3. Respondents thereupon filed separate suits in the United States District Court for the Eastern District of Virginia, seeking to enjoin the contemplated disclosure. The suits brought by respondents General Motors and United States Steel were consolidated for trial. The suit brought by respondent Westinghouse Electric proceeded independently. The claims of all three respondents were virtually identical: that disclosure was barred, *inter alia,* by exemptions 3 and 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(b)(3) and (4),[7] as well as by 18 U.S.C. 1905,[8] and that release of such documents would constitute an abuse of discretion.[9]

In the *Westinghouse Electric* case, the district

[7] These exemptions provide that the requirement of mandatory disclosure in the FOIA "does not apply to matters that are—* * * (3) specifically exempted from disclosure by statute * * * [or to] (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential * * *." See App. E, *infra,* p. 82a.

[8] 18 U.S.C. 1905 provides that "[w]hoever, being an * * * employee of the United States * * * discloses * * * in any manner or to any extent not authorized by law any information coming to him * * *, which information concerns or relates to the trade secrets, processes, operations [etc.] * * * of any * * * firm * * * shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment." See App. E, *infra,* pp. 82a-83a.

[9] Respondents also claimed that disclosure was barred by 42 U.S.C. 2000e-8(e). Respondents United States Steel and Westinghouse Electric additionally claimed that the documents were protected under exemption 7 of the FOIA.

court permanently enjoined petitioners from releasing specific portions of the AAP's and EEO-1's at issue (App. B, *infra,* p. 66a). Relying upon testimony taken at a *de novo* trial, the district court found that certain specified portions of the documents "contain commercial or financial information which is confidential" (App. B, *infra,* p. 62a) and that "the disclosure of [those portions] of the EEO-1['s] and AAP['s] is prohibited by the exemption contained in 5 U.S.C. 552(b)(4) * * *" (App. B, *infra,* p. 62a). The court also indicated that disclosure of portions of the documents was prohibited by 18 U.S.C. 1905 and that respondents could "invoke this statute to prevent the Government from disclosing information to a third party * * *" (App. B, *infra,* p. 64a).[10]

A few months after the decision of the district court in *Westinghouse Electric,* judgment was entered in the consolidated *General Motors* and *United States Steel* cases. The district court in those cases adopted "in toto" the opinion of the court in *Westinghouse Electric* and, after viewing the documents in issue, held that certain portions of them could not be disclosed (App. C, *infra,* pp. 70a-73a).

On consolidated appeals by all parties, the court of appeals affirmed (App. A, *infra,* p. 57a). The court of appeals stated that "disclosure of * * * exempt information is ordinarily discretionary with the agency [b]ut the exercise of this discretionary power is subject to the restraints imposed by other 'statutes * * *' and to any clear declarations of a legislative policy against

[10] The court rejected Westinghouse Electric's claim that disclosure of all parts of the documents was prohibited by exemption 7 (App. B, *infra,* p. 65a).

disclosure as reflected in an exemption of the [Freedom of Information] Act * * *'' (App. A, *infra,* p. 12a). The court held that under this general principle respondents were entitled to an injunction barring any disclosure that would violate 18 U.S.C. 1905 (App. A, *infra,* p. 41a).[11] In the alternative, the court of appeals held that exemption 4 provided the supplier of confidential commercial or financial information with an absolute right to have such information withheld from the public, and that ''the FOIA itself * * * confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4'' (App. A, *infra,* pp. 41a-42a; emphasis in original).[12] The court also ruled that respondents were entitled to a trial *de novo* in the district court on the question whether the information in question fell within either 18 U.S.C. 1905 or exemption 4 (App. A, *infra,* pp. 53a-54a; see *id. at* 50a-51a).[13]

On the merits, the court of appeals, without discussing the OFCCP regulations that authorized disclosure,

[11] The court was of the view that 18 U.S.C. 1905 was comprehended by exemption 3 of the FOIA, and thus that information within its coverage was both exempt from mandatory disclosure under the FOIA and nondisclosable (App. A, *infra,* pp. 14a, 26a).

[12] The court stated that the standard of confidentiality of exemption 4 and Section 1905 were the ''same'' or ''co-extensive'' (App. A, *infra,* pp. 27a, 36a). The standard of confidentiality adopted by the court was whether disclosure was likely to cause respondents substantial competitive injury (App. A, *infra,* p. 27a).

[13] The court rejected the argument that respondents' judicial remedy was limited to the review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, but the court concluded that even if review were available only under the APA, the procedure followed by the district courts here ''was free from error'' (App. A, *infra,* p. 38a).

held that the findings of the district court that portions of the EEO-1 reports and AAP's in question were within exemption 4 and 18 U.S.C. 1905 were not clearly erroneous (App. A, *infra,* p. 57a). The court sustained the injunctions against disclosure of those portions of the reports (App. A, *infra,* p. 57a).[14]

REASONS FOR GRANTING THE PETITION

These cases are representative of a steadily increasing number of so-called ''reverse FOIA'' suits by private parties seeking to enjoin the federal government from complying with FOIA requests.[15] Such cases raise important questions concerning the purpose of the Freedom of Information Act, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the executive branch in discharging the legislative directive, affirmatively expressed in the Act, to permit the ''fullest responsible disclosure.'' The court of appeals below, by disregarding, and thereby implicitly rejecting, regulations authorizing the disclosure of exempt materials, seriously misconstrued the language and purpose of the Freedom of Information Act. The court's holding that the executive branch lacks any power to disclose exemption 4 materials conflicts with *Charles River Park ''A,''*

[14] The court of appeals, however, rejected respondents' contentions that disclosure of their AAP's and EEO-1's, in their entirety, was prohibited by 42 U.S.C. 2000e-8(e) (App. A, *infra,* pp. 16a-17a), or that the documents were exempt from disclosure under exemption 7 of the FOIA (App. A, *infra,* pp. 15a-16a, n. 20).

[15] During 1976, at least 78 reverse FOIA suits were brought against the government.

Inc. v. *Department of Housing and Urban Development,* 519 F. 2d 935 (C.A.D.C.), and *Pennzoil Co.* v. *Federal Power Commission,* 534 F.2d 627 (C.A. 5), both of which recognized the existence of discretion to disclose. Furthermore, in holding that the district courts may appropriately conduct trials *de novo* to review an agency's determination to disclose, the court of appeals erroneously departed from the settled rule, often confirmed by this Court, that review of agency action under the Administrative Procedure Act is to be based upon the administrative record.

1. These cases originated with determinations by the Director of the Defense Supply Agency to comply with requests, made under the Freedom of Information Act, for disclosure of certain equal employment opportunity reports and affirmative action plans submitted to it by respondents. Those determinations were made pursuant to regulations specifically requiring disclosure, in compliance with such requests, of EEO-1 reports and, upon a finding of nonconfidentiality,[16] of AAP's as well. 41 C.F.R. 60-40.1 *et seq.* If, as we submit, those regulations are valid, the courts below would have been required to affirm the decision to disclose respondents' EEO-1 reports, and their review of the decision to disclose respondents' AAP's would have been limited to a determination whether those materials were exempt from mandatory disclosure under the

[16] In the interest of brevity, we use the expression "finding of nonconfidentiality" as a shorthand summarization of the determinations with regard to the public interest, competitive injury, confidentiality, etc., that must be made in connection with a decision to disclose AAP's. See pp. 5-6, *supra*.

FOIA and, if so, of the correctness of the agency's finding of nonconfidentiality.

The regulations authorizing disclosure of the materials at issue here are valid. The court of appeals did not give explicit consideration to those regulations, but its holding that the government may not disclose information within exemption 4 of the Freedom of Information Act constitutes an implicit rejection of them."

The court's holding in this regard reflects a misunderstanding of the FOIA. The FOIA is a broadly conceived statute whose "basic policy" and "dominant objective" is "disclosure, not secrecy." *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361. When Congress enacted the Act, it was "plac[ing] emphasis on the fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Thus the exemptions under that Act only permit, they do not require, the government to refuse disclosure of information. *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra,* 519 F. 2d at 941; *Pennzoil Co.* v. *Federal Power Commission, supra,* 534 F. 2d at 629-631. The approach taken by the court below therefore is inconsistent with that taken in similar reverse FOIA cases by the courts in *Charles River Park* and *Pennzoil.*[18]

[17] The court of appeals discussed a Department of Labor regulation, 29 C.F.R. 70.21(a), which prohibits any employee of the Department from disclosing certain records "in any manner or to any extent not authorized by law" (App. A, *infra,* pp. 24a-25a). But disclosure by the OFCCP of the documents at issue here was made pursuant to the authority granted by 41 C.F.R. Part 60-40. The court of appeals' reliance upon 29 C.F.R. 70.21(a) as a ground for enjoining disclosure therefore was misplaced.

[18] It is unclear, however, whether the decision below conflicts with

Furthermore, nothing in the FOIA forbids disclosure. The exemptions, while an important component of the Act, merely describe "the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 80. Disclosure of exempt material is left to the discretion of the officials administering the Act:

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive.* They merely mark the outer limits of information that *may* be withheld where the agency * * * determin[es] * * * that the information *should be* withheld. [S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974); emphasis in original.]

Congress understood and intended that discretion to disclose exempt materials could be exercised pursuant to regulations such as those promulgated by the Secretary of Labor authorizing disclosure here. In considering the 1974 amendments to the Act, Congress expressed approval of agency regulations that provide for the discretionary disclosure of exempt information, including commercial or financial information within

Charles River Park and *Pennzoil* in final result. The courts in those cases held that disclosure decisions could be reviewed for abuse of discretion, and the court in *Charles River Park* indicated that, at least in most circumstances, disclosure of material of the kind described in 18 U.S.C. 1905 would be an abuse of discretion. 519 F. 2d at 542, 543 n. 10. However, there is no suggestion that the court in *Pennzoil* would have barred disclosure here.

exemption 4. See S. Rep. No. 93-854, *supra,* at 6.[19] The Senate Committee stated that "[t]his approach was clearly intended by Congress in passing the FOIA". *Ibid.* See also H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 4 (1974); H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 7, 13-17 (1972). And see *General Services Administration* v. *Benson,* 415 F. 2d 878 (C.A. 9). Cf. *Federal Communications Commission* v. *Schreiber,* 381 U.S. 279; *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 306 U.S. 56. But see *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra.*

The controlling regulations here implement Congress' intention under the FOIA to afford "the fullest responsible disclosure." Under the regulations, disclosure generally is predicated upon a determination that it would "further[] the public interest and * * * not impede any of the functions of the OFCC[P] or the Compliance Agencies * * *." 41 C.F.R. 60-40.2(a). But the regulations also give recognition to the competitive interests of government contractors by requiring the agency to determine whether "release would injure the business or financial position of the contractor * * *." 41 C.F.R. 60-40.3(a)(2); see generally 41 C.F.R. 60-40.3(a). These regulations are reasonable and should have been sustained by the court of appeals.

[19] The committee report commented favorably upon 43 C.F.R. 2.2 (Department of Interior), 45 C.F.R. 5.70 (Department of Health, Education, and Welfare), 24 C.F.R. 15.21 (Department of Housing and Urban Development), 49 C.F.R. 7.51 (Department of Transportation), all of which provide for the disclosure of exempt information. See also, *e.g.,* 28 C.F.R. 16.1(a) (Department of Justice); 10 C.F.R. 9.10(c) (Nuclear Regulatory Commission); 40 C.F.R. 2.101 (Environmental Protection Agency).

Insofar as the decisions to disclose respondents' EEO-1 reports and AAP's were authorized by the regulations, they also should have been sustained.

The court of appeals nevertheless held that disclosure was barred by 18 U.S.C. 1905 (App. A, *infra,* p. 41a). That criminal statute forbids disclosure by government officials of certain documents "in any manner or to any extent not authorized by law * * *" (see App. E, *infra,* pp. 82a-83a).[20] But, unless the agency erred in its finding of nonconfidentiality with regard to the AAP's, disclosure here was "authorized" by the Department of Labor regulations. Since validly promulgated regulations have the force of law (see *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, 542-543; cf. *Service* v. *Dulles,* 354 U.S. 363), they satisfy the authorization requirement of 18 U.S.C. 1905. Cf. *Smith* v. *United States,* 305 F. 2d 197, 201-202 (C.A. 9); *Laughlin* v. *United States,* 474 F. 2d 444, 453, n. 12 (C.A. D.C.), certiorari denied, 412 U.S. 941.[21]

[20] The disclosure of information that is not exempt from mandatory disclosure under the FOIA is "authorized" by the FOIA. The court of appeals here held, however, that 18 U.S.C. 1905 is an exemption 3 statute (see note 11, *supra*). See *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255. But see H.R. Rep. No. 94-1178, 94th Cong., 2d Sess. 14 (1976); *National Parks and Conservation Association* v. *Kleppe,* No. 76-1044, decided November 15, 1976 (C.A.D.C.) (slip op. 26-28). As we argue immediately below, whether or not the materials here are exempt from mandatory disclosure, disclosure of the information is "authorized" by 41 C.F.R. Part 60-40. Accordingly, the question whether 18 U.S.C. 1905 is an exemption 3 statute need not be reached in this case.

[21] The term "authorized by law" in 18 U.S.C. 1905 and its predecessor statutes (see 15 U.S.C. (1940 ed.) 176b; 19 U.S.C. (1940 ed.) 1335; 18 U.S.C. (1940 ed.) 216; R.S. 3167, 28 Stat. 557; 13 Stat. 238) has been broadly construed. See, *e.g., Blair* v. *Oesterlein Company,* 275 U.S. 220, 227; *United States* v. *Dickey,* 268 U.S. 378; *Exchange National Bank* v. *Abramson,* 295 F. Supp. 87 (D. Minn.);

Thus even if the materials at issue otherwise are of the type described in 18 U.S.C. 1905, their disclosure is not prohibited by that statute if it is permitted by regulation.

2. Judicial review of adverse agency action taken pursuant to a statutory or a regulatory standard normally is governed by the APA. See, *e.g., Dunlop* v. *Bachowski,* 421 U.S. 560; *Camp* v. *Pitts,* 411 U.S. 138; *Citiens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402.[22]

But the scope of review provided under the APA for cases such as this is narrow. Indeed, once it is determined that the regulations authorizing disclosure are valid, the agency's determination to disclose EEO-1 reports would be essentially unreviewable: the regulations affirmatively require disclosure of all EEO-1 reports upon request, and a reviewing court could do no more than ascertain whether the materials to be dis-

cf. *Consumers Union* v. *Cost of Living Council,* 491 F. 2d 1396 (T.E.C.A.), certiorari denied *sub nom. Business Roundtable* v. *Consumers Union,* 416 U.S. 984. While the early origins of the statute have obscured its principal purpose, it was most likely designed to prevent government officials from taking advantage of their official position to sell or otherwise make public confidential business data. We do not believe it was intended to operate to inhibit an agency from disclosing such information in connection with valid program or policy objectives. See 41 Op. Atty. Gen. 166, 169 (1952) ("authorized by law" includes "authorized in a general way by law").

[22] The exceptions to judicial review (see 5 U.S.C. 701) do not appear to be applicable here. In the court of appeals, the government argued that respondents' suits were barred by sovereign immunity. But Congress since has amended the APA to provide that its judicial review provisions waive sovereign immunity in cases seeking declaratory or injunctive relief. Pub. L. 94-574, 90 Stat. 2721.

closed were in fact such reports. The scope of review of a decision to disclose AAP's would be only slightly broader: the court would determine whether the agency's conclusion that the materials were disclosable under the regulatory standard was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

As a matter of course, such review would be on the basis of the administrative record. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts, supra,* 411 U.S. at 142. See also *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 415-416.

Respondents were notified of the FOIA requests for the documents they had furnished in connection with their government contracts, they were informed of the exact documents subject to the request, and they were afforded a full opportunity to submit materials in support of their claim that the documents should not be disclosed. See pp. 6-8, *supra.* The record in these cases thus provided an adequate basis upon which to undertake an assessment of the agency's determinations to disclose. Accordingly, the court of appeals plainly erred in approving the district court's *de novo* review of those determinations.[23]

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[23] The court of appeals approved *de novo* review on the theory that respondents' suits were based upon implied causes of action under exemption 4 and 18 U.S.C. 1905. That theory fails for two separate reasons. If, as we have argued, the disclosure regulations here are valid, *a fortiori* respondents had no residual right to nondisclosure under either exemption 4 or 18 U.S.C. 1905; in that event respondents' rights to nondisclosure are measured solely by the disclosure regulations, and review of a determination to disclose is available only under the APA for the reasons discussed above. On the other hand, if the disclosure regulations are invalid, it could only be because respondents have a statutory right to nondisclosure with which those regulations conflict; in that event, a determination to disclose would "adversely affect or aggrieve" respondents within the meaning of 5 U.S.C. 702, for that reason they would be entitled to APA review of the agency determination, and therefore there would be no need to infer an independent right of action under some other statute. Cf. *Cort* v. *Ash,* 422 U.S. 66; *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412; *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BARBARA ALLEN BABCOCK,
Acting Assistant Attorney General.

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys.

FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1801

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA COUNTY, AND COUNCIL ON ECONOMIC PRIORITIES, INTERVENOR-DEFENDANTS.

No. 74-1802

WESTINGHOUSE ELECTRIC CORPORATION AND ITS SUBSIDIARY, FRASER & JOHNSTON CO., APPELLANTS,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR,

OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR; AND CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, APPELLEES.

No. 74-1803

WESTINGHOUSE ELECTRIC CORPORATION AND ITS SUBSIDIARY, FRASER & JOHNSTON CO., APPELLEES,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, DEFENDANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA COUNTY, AND COUNCIL ON ECONOMIC PRIORITIES, APPELLANTS.

No. 74-2047

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES A. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; WALLACE ROBINSON, DIRECTOR DEFENSE

SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, DEFENDANTS.

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, INTERVENORS-APPELLANTS.

No. 74-2048

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; WALLACE ROBINSON, DIRECTOR DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, DEFENDANT-INTERVENORS.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

No. 75-1268

UNITED STATES STEEL CORPORATION, APPELLANT,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON,

DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, APPELLEES.

No. 75-1269

UNITED STATES STEEL CORPORATION, APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, APPELLANTS.

No. 75-1270

GENERAL MOTORS COPORATION, APPELLANT,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLEES.

No. 75-1271

GENERAL MOTORS CORPORATION, APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: December 4, 1975. Decided: Sept. 30, 1976

Before RUSSELL and WIDENER, Circuit Judges, and THOMSEN, Senior District Judge.*

RUSSELL, CIRCUIT JUDGE:

The plaintiffs in these three actions are government contractors, seeking injunctive and declaratory relief against the disclosure of certain information filed by them with the Office of Federal Contract Compliance

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* Sitting by designation.

(OFCC), as required under regulations issued by the Secretary of Labor pursuant to Executive Order 11,246,[1] as amended by Executive Order 11,375.[2] Two of the actions were consolidated for trial in the District Court,[3] and heard by one judge; the third action proceeded independently in the same court and was heard by another judge. In the three actions, however, plaintiffs were granted similar partial protection from disclosure of the information in question.[4] The defendants appeal from the denial of the motions to dismiss and to the grant of any relief herein; the plaintiffs cross-appeal from the denial of protection from disclosure of all the material filed by them under the requirements of the Executive Orders. All three cases involve, so

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[1] The OFCC was given the authority to "adopt such rules and regulations and issue such orders as * * * necessary and appropriate to achieve the purposes thereof." § 201, Executive Order 11,246.

[2] The text of Executive Order 11,246, as amended by Executive Order 11,375, is set forth in 3 C.F.R. 169-177, (1974).

[3] The action by *General Motors* against the defendants were consolidated and tried with *United States Steel* and any reference to the *United States Steel* case covers the *General Motors* case as well.

[4] *Westinghouse Electric Corporation v. Schlesinger* (E.D. Va. 1974) 392 F. Supp. 1246; *United States Steel Corp. v. Schlesinger* (E.D. Va. 1974) 34 Ad. L. 2d 790.

The two opinions, though, rendered by different judges of the same court, were, for all practical purposes, identical and any reference to "court" hereafter in the opinion is to the opinions and decisions of both judges.

The cases themselves are reviewed in detail in O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 *Bus. Lawyer* 1125, 1139-41 (1975), and *see, also,* discussion in Note, *Developments Under the Freedom of Information Act-1974*, 1975 *Duke L.J.* 416 at 428-9.

far as material, like facts and like legal issues. For this reason, we have consolidated them on appeal and dispose of them in this opinion.

We affirm.

The information, the disclosure of which is the subject of controversy, was supplied under the provisions of an Executive Order, and the regulations issued thereunder, which required a government contractor, such as the plaintiffs, to file, with respect to any plant or facility engaged in performing work under a government contract, an Affirmative Action Program (AAP) and an Equal Employment Opportunity Report (EEO-1). These reports are to be filed with the contracting agency having responsibility for the contract. They are to include extensive information on staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority and related matters as well as forecasts of future employment, goals, timetables and future employment projections, promotion and utilization of minorities and females. They embrace, also, an analysis of the employer's success in meeting such goals. All the plaintiffs filed such reports. The reports of the plaintiff United States Steel covered its Youngstown, Ohio plant, and the American Bridge Division plant at Gary, Indiana; the reports of the plaintiff General Motors dealt with its plants at Danville, Illinois, and Bedford, Indiana; and the plaintiff Westinghouse filed reports with respect to its plant at East Pittsburgh, Pennsylvania, and its Fraser & Johnston Co. subsidiary plant at San Lorenzo, California. In submitting such reports, all the plaintiffs did so under a claim of confidentiality. The reports,

prepared on Standard Form 100, bore the following governmental promise or guarantee of confidentiality: "[A]ll reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII."[5]

Third parties made requests of the defendants for disclosure under the Freedom of Information Act (FOIA)[6] of the AAP's and EEO-1's filed with them by the several plaintiffs. The defendants advised the plaintiffs of the requests and of a preliminary determination that the FOIA's and OFCC's disclosure rules required that the requested material, with certain identified deletions, be made available, but that before

[5] In *Legal Aid Society of Alameda County v. Shultz* (N.D. Cal. 1972) 349 F. Supp. 771, 776, the Court held that "administrative promises of confidentiality cannot extend the command of the Freedom of Information Act that only matters 'specifically exempted from disclosure by statute' are protected under § 552 (b)(3)" (Italics in opinion). *Cf., however,* 3A.19 Davis, *Administrative Law Treatise,* pp. 150-1 (1970 Supp.).

In *Robles v. Environmental Protection Agency* (4th Cir. 1973) 484 F.2d 843, 846, we reached the same result as did the Court in the *Shultz Case.*

Since *Shultz,* the defendants have conceded that their promise of confidentiality is unavailing if the matter sought to be discovered is not exempted from disclosure by the terms of § 552 itself. Suppose, however, the material does fall within an exemption and that disclosure under the particular exemption is discretionary with the agency, has the agency by its promise of confidentiality foreclosed itself from the exercise of any discretion to disclose and obligated itself to respect the confidentiality? *See* Davis, *The Information Act: A Preliminary Analysis,* 34 *U.Chi.L.Rev.* 761 at 787-92 (1967); Note, *The Freedom of Information Act: A Seven-Year Assessment, supra,* 74 *Colum. L.Rev.* at 948-50. Since the District Court, however, did not predicate its decision on any such point, we see no occasion to consider this point.

[6] 5 U.S.C. § 552.

the information would be released, the plaintiffs would be afforded an opportunity to present any claim that the information requested was exempt from disclosure under the FOIA and the appropriate administrative regulations. The plaintiffs submitted their objections to the disclosure, claiming that the requested information was not disclosable under the terms of 5 U.S.C. 552(b)(3), (4), (6) and (7), 18 U.S.C. § 1905, and 42 U.S.C. § 2000e-8(e), as well as 41 C.F.R. 60-1.1, *et seq.* of the Department of Labor's own regulations.[7] The defendants responded by advising the plaintiffs that under the FOIA and the regulations issued thereunder, the defendants were obliged, absent judicial intervention, to release the information, subject to certain specified deletions. These actions to enjoin, and for a declaratory judgment that the material was exempt under the FOIA, and disclosure thereof forbidden under applicable statutes and regulations, followed. The District Court, finding federal jurisdiction under § 1331, 28 U.S.C., granted injunctive relief but denied a declaratory judgment. In reaching its conclusion, the court made, among others, this finding of fact:

> "This Court finds from the evidence presented that the AAPs and EEO-1s in question contained confidential commercial or financial information

[7] Exemptions 3 and 4, which are the only exemptions later found to be appropriate, are as follows:

"(b) This section does not apply to matters that are-

* * *

(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

which would not customarily be released to the public by the corporate plaintiffs, and that such information would be of substantial value to the plaintiff's competitors in performing cost-price analyses of plaintiffs' pricing practices, in monitoring plaintiffs' development of new products and processes, in identifying plaintiffs' customers in their consumption needs, in analyzing plaintiffs' production by product line, and in developing competitive bidding strategies to be used against the plaintiffs; and that disclosure of this information would both impair the Government's ability to obtain necessary information for its administration of the Executive Orders and Title 7 of the Civil Rights Act and would cause substantial harm to the competitive position of the plaintiffs."[8]

The decision of the District Court enjoining disclosure herein rests to a substantial extent on a construction of the FOIA.[9] This statute mandates the release

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[8] This finding was made in the cases of *United States Steel* and *General Motors v. Schlesinger, supra,* but is similar to the finding of fact made in the *Westinghouse* case.

[9] § 552, 5 U.S.C.

The construction of the Act is complicated not only by the language of the Act itself but by its legislative history as well. Professor Levin, in his article, *In Camera Inspections Under the Freedom of Information Act,* 41 *U. Chi. L. Rev.* 557, ns. 9 and 10 (1974), quotes "Professor Kenneth Culp Davis, the Act's most influential commentator" to the effect that the Act is a "shabby product" and adds that "[i]nterpretation of the Act is complicated by the fact that the House and Senate committee reports on the Act contradict each other in many particulars, and in some instances contradict the statutory language itself."

This ambiguity in the language of the Act and in its legislative history, the author points out, has been productive of much of the litigation under the Act.

by public officials of information in their custody, *subject to certain exemptions specifically enumerated in the Act itself.*[10] If the information sought to be dis-

[10] It has been stated that these exemptions "constitute in the aggregate a substantial withdrawal of the public's right of access to information." Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 *Colum. L. Rev.* 895, 929 (1974).

The reason for including them in the Act was that, "in developing a statute providing greater citizen access to agency information, Congress recognized the necessity for protecting the confidentiality of some agency information and the right of privacy of some individuals who are required to provide agencies with confidential information. To protect these interests Congress exempted nine categories of information from mandatory disclosure." Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 *Nw. U.L. Rev.* 995 (1976).

In commenting on *National Parks and Conservation Ass'n. v. Morton* (D.C.Cir. 1974) 498 F. 2d 765, which dealt with the exemptions in the Act, the editor in 88 *Harv. L. Rev.* 470 at 474 (1974), said:

> "* * * The Court found that the Act's strong emphasis on public disclosure was counterbalanced, in the nine exemptions, by the public interest in efficient governmental operation and by various interests of private informants in maintaining secrecy."

It is often declared in the decisions construing the exemptions that they are to be "narrowly construed." *Ethyl Corporation v. Environmental Protection Agency* (4th Cir. 1973) 478 F. 2d 47, 49. But, as one writer has prudently observed, the Court, in following this rule of construction, must "recognize that the public's interest in confining the breadth of the exemptions is not equally strong for all nine provisions." *Ibid.,* 41 *U.Chi.L.Rev.* at 564, n. 52. This distinction is important when the request for information relates to "the agency's actions, plans, and policies" rather than when it relates to information that has to do with the "actions, plans, and policies" of private parties. *Ibid.,* 41 *U.Chi.L.Rev.* at 565; Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 *Akron L. R.* 673, 694 (1976).

closed under the Act "fall[s] within one of the Act's exempt categories, * * * the Act 'does not apply' to such documents." *NLRB v. Sears, Roebuck & Co.* (1975) 421 U. S. 132, 147-8; *Charles River Park "A" Inc. v. Department of H. & U.D.* (D.C.Cir. 1975) 519 F. 2d 935, 942.[11] So far as exempt information is concerned, the Act, in the ordinary situation "neither authorizes [n]or prohibits the disclosure of such information," and the disclosure of such exempt information is ordinarily discretionary with the agency. But the exercise of this discretionary power is subject to the restraints imposed by any other "statutes, rules, and regulations"[12] and to any clear declarations of a legislative policy against disclosure as reflected in an exemption of the Act itself,[13] and, when review of an

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[11] The Act itself, § 552(b), 5 U.S.C., it would appear makes this clear by the following provision:

> "This section [of the FOIA] does not apply to matters that are-" within the definitions of exemptions (1)-(9).

[12] *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.* (4th Cir. 1974) 508 F. 2d 945, 950.

[13] *See,* 70 *Nw.U.L.Rev., supra,* at 1011:

> "If a particular disclosure would be contrary to a policy of the Act, [such as release in a particular case of material within the fourth exemption] a court may properly find that an agency 'abused its discretion' in deciding to release the information-an approach coupling the policy considerations of the FOIA with the remedial provisions of the APA."

The editor in the Note, *Protection from Government Disclosure-The Reverse-FOIA Suit,* 1976 *Duke L.J.* 330 at 340, expresses substantially the same thought:

> "The cases suggest three specific approaches the reverse-FOIA plaintiff might use once he has shown that the information in question is FOIA exempt: he can allege (1) that disclosure of the information in question would violate a statute; (2) that disclosure would be contrary to agency regulations; or (3) that disclosure would constitute an abuse of discretion."

In this connection, we would sharply distinguish between equitable jurisdiction invoked with reference to non-exempt and exempt information. As the Court said in *Freuhauf Corporation v. Internal Revenue Service* (6th Cir. 1975) 522 F. 2d 284, appeal pending, "we do not conceive that the traditional equitable powers of the district court justify it or us in adding a tenth or eleventh exemption to the nine specifically enumerated in the Act * * *." 522 F. 2d at 292. This in effect accords with our decisions in *Wellman Industries, Inc. v. N.L.R.B.* (4th Cir. 1974) 490 F. 2d 427, 429, *cert. denied* 419 U. S. 834 (1974), and *Wellford v. Hardin* (4th Cir. 1971) 444 F. 2d 21, 25. And, as we understand *Renegotiation Board v. Bannercraft Co.* (1974) 415 U. S. 1, discussed at length *infra,* its reference to federal equity jurisdiction in this area is concerned with *exempt* information under the FOIA. This, however, is not the universal view. For a general discussion of the question, *see,* Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 *Colum. L. Rev.* 895, 911-20 (stating the case for general equity jurisdiction for both exempt and non-exempt information); Note, *Developments Under the Freedom of Information Act-1974,* 1975 *Duke L.J.* 416 at 418-27; Note, *Developments Under the Freedom of Information Act-1975,* 1976 *Duke L.J.* 366 at 370-2. While not direct to this point, *Department of the Air Force v. Rose* (1976) — U. S. —, might be considered as pointing in the direction that the discretionary jurisdiction does not cover non-exempt information.

[14] § 706(2)(A), 5 U.S.C.; *Charles River Park "A", Inc. v. Department of H. & U.D., supra,* 519 F. 2d at 940-1; Note *Ibid.,* 70 *Nw.U.L.Rev.* at 995 and 1011.

administrative decision to disclose is sought under the APA, it is subject to reversal if arbitrary, capricious, an abuse of discretion "or otherwise not in accordance with law."[14] The fact that a contrary statute will prevent the exercise of any discretionary authority in the agency to release exempt information follows because it is settled that the FOIA does not repeal directly or by implication any other statutes which may

limit or restrict the disclosure of information by public officials, and those other statutes remain in full force and effect despite the enactment of the FOIA.[15] Thus if there is some other statute or regulation which prohibits the disclosure of the exempt information, there is no agency discretion and "the [government] agencies have no alternative but to follow the legislative mandate" or agency regulation and to deny disclosure.[16] This follows because, whenever disclosure of the information in question would be violative of some other federal statute, both its exempt-character under the FOIA and its nondisclosability are thereby established.[17] This conclusion results from the Act's own

[15] *FAA Administrator v. Robertson* (1975) 422 U.S. 255, 265; *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.* (4th Cir. 1974) 508 F. 2d 945, 950.

[16] Note, *Freedom of Information: The Statute and the Regulation*, 56 *Geo.L.J.* 18, 34 (1967).

Cf., also, EPA v. Mink (1973) 410 U.S. 73 at 95, note, (Stewart, J., concurring):

> "Similarly rigid is [exemption 3], which forbids disclosure of materials that are 'specifically exempted from disclosure by statute.' Here, * * * the only 'matter' to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, * * *."

[17] *Ibid.*, 1976 *Duke L.J.* at 340.

In this article the editor correctly states that a FOIA-plaintiff "need show only that disclosure would violate a particular federal statute in order to prove both that the information is FOIA-exempt and also that disclosure must be enjoined. Once it is determined that a specific statute prohibits the disclosure of certain information, the information is by definition exempt from mandatory disclosure under the statutory exemption of the FOIA. At the same time, disclosure which would violate a statute may be enjoined under the APA as agency action which is 'not in accordance with law.'"

exemption of all matters that are "specifically exempted from disclosure by statute,"[18] and from the holding in *FAA Administrator v. Robertson, supra,* 422 U.S. at 265, discussed later, that the FOIA does not repeal or modify any other statute which may restrict disclosure.[19]

In these cases, the plaintiffs assert that both the Civil Rights Act of 1964, Title VII, § 709(e), 42 U.S.C., § 2000e-8(e), and § 1905, 18 U.S.C., which prohibit under criminal penalty the disclosure by any federal employee of confidential trade and financial information supplied a federal agency, represent statutes embraced within exemption (b)(3) of the FOIA, and are statutes which prohibit the release of much of the information in the two reports in question. They raised this contention in thier objection to disclosure submitted administratively to the defendants. The defendants, however, dismissed the claim under both statutes. They specifically found that § 2000e-8(e) did "not prohibit the release of information by officers or employees of other Government agencies where such information is obtained under other authority as E.O. 11246 which requires contractors having a contract, containing provisions prescribed in Section 202 of said E.O. to file Compliance Reports and furnish such information." The same objections to disclosure, based upon both § 1905 and § 709(e), were pressed in the District Court.[20] That Court, is disposing of the claims,

[18] § 552(b) (3).

[19] 422 U.S. at 265.

[20] The plaintiffs, also, claimed exemption under (b) (7), which deals with investigatory files. The District Court found such a

stated that 709(e) of the Civil Rights Act of 1964 was not applicable since the reports involved here were filed, not under the provisions of the Civil Rights Act of 1964, but under Executive Order 11,246. It did not deal specifically with § 1905 as within the exemption of (b)(3) of the Act but it did conclude that § 1905, taken in conjunction with (b)(4), represented a clear prohibition against disclosure of "confidential" material as defined in (b)(4) of the Act and in § 1905. The plaintiffs, by their cross-appeal, renew their contentions under § 709(e).

So far as a claim under § 709(e) is concerned, we are inclined to agree with the District Court that, despite the persuasiveness of the argument to the contrary, and the cogent reasoning advanced by Justice Douglas in his opinion disposing of a request for a stay in *Chamber of Commerce v. Legal Aid Society* (1975) 423 U.S. 1309, the information involved here cannot claim immunity under § 709(e) as a statute forbidding dis-

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claim without merit. The 1974 amendments to the Act, which are applicable here, fully support this conclusion. *See, Ibid.*, 1976 *Duke L. J.* at 399-401. Those amendments, the Court declared in *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. at 164-5, extend this exemption "only to * * * 'the production of such records [which] would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, [or] constitute [an] * * * unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.'" Obviously, the information in question cannot qualify under that standard and it is accordingly unnecessary to consider further this claim of the plaintiffs. *See,* Note, Fuselier and Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 *U.Rich.L.R.* 541 (1976)

closure of the information in question in these actions.[21]

The applicability of § 1905, upon which the District Court rested its decision, is, however, considerably more compelling. This is because of the recent decision in *FAA v. Robertson.* There had been, prior to *Robertson,* considerable contrariety in the decisions of the District and Circuit Courts on the statutes properly within the scope of Exemption 3. Some of those conflicting decisions are cited by the Supreme Court in *Robertson,* 422 U.S. at 262-3, n. 6.[22] Among those statutes about which there has been such a difference of opinion is § 1905. Thus, in the early case of *Consumers Union of U. S., Inc. v. Veterans Admin.* (S.D.N.Y. 1969) 301 F. Supp. 796, 801-2, appeal dismissed on other grounds, 436 F. 2d 1363, it was assumed that § 1905 was within the coverage of Exemption 3 but the Court found that the information there involved did "not appear to contain trade secrets or other information mentioned in § 1905."[23] However, in a consistent line of cases, beginning with *Grumman Aircraft Engineer. Corp. v. Renegotiation Bd.* (D.C.Cir. 1970) 425 F. 2d 578, 580, n. 5, and continuing up to *Charles River Park "A",*

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[21] *See, Sears, Roebuck and Co. v. General Services Admin.* (D.C. Cir. 1974) 509 F.2d 527, 529; *Huges Aircraft Company v. Schlesinger* (D.C. Cal. 1974) 384 F. Supp. 292, 295; *Legal Aid Society of Alameda County v. Shultz* (N.D. Col. 1972) 349 F. Supp. 771, 775-6.

[22] An interesting case, not listed in *Robertson* and which reached a contrary result to that in the District of Columbia decisions, later discussed, is *Nichols v. United States* (10th Cir. 1972) 460 F. 2d 671, 673, *cert. denied* 409 U. S. 966 (1972), involving items and material connected with the assassination of President Kennedy.

[23] To the same effect is *Pleasant Hill Bank v. United States* (W.D. Mo. 1973) 58 F.R.D. 97, 98, n. 1.

Inc. v. Department of H. & U.D. (D.C.Cir. 1975) 519 F. 2d 935, 941, n. 7, the District and Circuit Courts of the District of Columbia have held that § 1905 is not among the statutes referred to in § 552(b)(3).

In *Grumman,* the earliest of these cases, the rationale for this holding was stated to be that "section 1905 merely creates a criminal sanction for the release of 'confidential information.' Since this type of information is already protected from disclosure under the Act by 552(b)(4), section 1905 should not be read to expand this exemption, especially because the Act requires that exemptions be narrowly construed." In other words, § 1905 was found under this reasoning to be "co-extensive with exemption 4," which itself constituted "a *separate ground for non-disclosure" and accordingly* it was unnecessary to consider whether § 1905 fell within the third exemption of the Act since the result would be the same in any event.[24] In *M. A. Schapiro & Co. v. Securities and Exchange Com'nr.* (D.C. D. 1972) 339 F. Supp. 467, 470, the Court found another reason for denial of inclusion of § 1905 within (b)(3). It said:

> "* * * There is nothing in § 1905 of Title 18 that prevents the operation of the Freedom of Information Act. Moreover, the provision for documents specifically exempted from disclosure by statute [5 U.S.C. § 552(b)(3)] relates to those other laws that restrict public access to *specific* government records. It does not, as defendants allege, relate to a statute [such as § 1905] that

[24] *See Ditlow v. Volpe* (D.C. D. 1973) 302 F. Supp. 1321, 1324, *rev.* on other grounds 494 F.2d 1073.

> generally prohibits all disclosures of confidential information." [25]

Other cases from the District of Columbia have proceeded on this distinction between statutes which described *"specific"* records as nondisclosable and those which *generally* prohibited disclosure in finding § 1905 and like statutes not within (b)(3).[26] This reasoning was adopted in *Robertson v. Butterfield* (D.C. Cir. 1974) 498 F.2d 1031, 1033, n. 6, *rev. sub nom. FAA Administrator v. Robertson* (1975) 422 U.S. 255, where, in finding that nondisclosure under the authority of § 1504, 49 U.S.C., a statute which represented a general

[25] The holding in this case was summarized in O'Reilly, *ibid.*, p. 1135:

> "* * * The district court held * * * that the general nature of its prohibition prevented Section 1905's application to the FOIA exceptions for documents 'specifically exempted from disclosure by statute.' "

The District Court of New York had reached a similar result in *Frankil v. Securities and Exchange Commission* (S.D. N.Y. 1971) 336 F. Supp. 675, reversed without reference to this point, 460 F.2d 813, *cert. denied* 409 U.S. 889 (1972) but the later case of *Consumers Union, supra,* from the same District, 301 F. Supp. 796, seems to be contrary.

[26] Other cases, echoing the reasoning on this point in *Schapiro,* are *Sears, Roebuck & Co. v. General Services Admin.* (D.C. Cir. 1974) 509 F.2d 527, 529, and *Neal-Cooper Grain Company v. Kissinger* (D. D.C. 1974) 385 F. Supp. 769, 776. In *Neal-Copper,* the Court said:

> "The 'ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny.' The law in this Circuit, as stated *supra,* appears to be that 18 U.S.C. § 1905 is not sufficiently specific to come within Exemption (3). No more need be said on that score."

prohibition of disclosure of confidential information rather than of "specific" records, was not justified by reference to Exemption 3, the Court said:

> "18 U.S.C. § 1905 is a criminal statute prohibiting unauthorized disclosure of any information by a federal employee. There is nothing in the section which prevents the operation of the Information Act. It does not fall within the ambit of Exemption (3)," citing *Schapiro.*

Whether the Court in *Butterfield,* by its reference to the fact that § 1905 was a criminal statute, found in this any reason for excluding it from the scope of Exemption 3 is perhaps unclear. If it did, though, the decision manifestly is at variance with the later decision from the same court in *Parker v. Equal Employment Opportunity Commission* (D.C. Cir. 1976) 534 F.2d 977, where the Court found, after stating that "[t]he Supreme Court [in *FAA Administrator v. Robertson* (1975) 422 U.S. 255] has extended that exemption [*i.e.,* (b)(3)] beyond what may have been its narrowest compass," found the statute involved there, which was a criminal statute like § 1905, within Exemption 3. And in both *Tax Analysts & Advocates v. I.R.S.* (D.C. Cir. 1974) 505 F.2d 350, and *Freuhauf Corporation v. Internal Revenue Service, supra,* 522 F.2d 284, it was recognized that a criminal statute (§ 7213, 26 U.S.C.) would qualify under Exemption 3. There remain only two objections that (1) § 1905 does not contain language which "prevents the operation of the FOIA" and (2) that it is a general prohibition on disclosure rather than a prohibition against the disclosure of "specific" records. The Court in *Charles*

River Park effectively answered the first objection[27] and the Supreme Court in *FAA v. Robertson,* reversing *Robertson v. Butterfield,* it seems manifest, disposes finally and conclusively of both objections to § 1905 as qualifying under Exemption 3.[28]

The Supreme Court in *Robertson,* focusing upon Exemption 3, concluded (1) that it was not the intent of Congress in enacting the FOIA to repeal or amend in any way statutes then "extant" which restricted access to especific government information but intended that such statutes should remain in effect, and (2) that the term "specific" in Exemption 3 does not mean that such Exemption applies only to statutes restricting access to *named* documents but applies to statutes which *generally* direct government agencies to withhold.[29] And it specifically rejected the construction

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[27] 519 F.2d at 522.

The reasoning of *Charles River Park* on this point may be summarized thus: Information "confidential" under the test stated in *National Parks and Conservation Ass'n. v. Morton, supra,* 498 F.2d at 770, is necessarily both within Exemption 4 of the FOIA, and the prohibition of § 1905. Since such information would be exempt from disclosure under the FOIA, its disclosure is not "authorized" under the FOIA and its disclosure is prohibited under § 1905.

[28] We had, to some extent at least, anticipated *Robertson* in our decision in *Sears v. Gottschalk* (4th Cir. 1974) 502 F.2d 122 at 128-31.

See, also, Citizens for a Better Environ. v. Dept. of Com. (N.D. Ill. 1976) 410 F. Supp. 1248, 1249-50.

[29] 422 U.S. 264-66.

The Court said at pp. 265-66:

> "• • • The term 'specific' as there used cannot be read as meaning that the exemption applies only to documents specified, *i.e.,* by naming them precisely or by describing the cate-

of the Exemption as phrased in *Schapiro.*[30]

It is true that *Robertson* did not identify § 1905 as a

gory in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation—a task which the legislative history shows it clearly did not undertake.

"* * * To spell out repeal by implication of a multitude of statutes enacted over a long period of time, each of which was separately weighed and considered by Congress to meet an identified need, would be a more unreasonable step by a court than to do so with respect to a single statute such as was involved in the *Regional Rail Reorganization Act Cases,* * * *. Congress' response was to permit the numerous laws then extant allowing confidentiality to stand; it is not for us to override that legislative choice."

[30] *See Citizens for a Better Environ. v. U. S. Dept. of Com.* (N.D. Ill. 1976) 410 F. Supp. 1248, 1249-50.

That *Robertson* is in effect a reversal of *Schapiro* and related cases is, also, the opinion of the editor in the Note, *Developments under the Freedom of Information Act—1975,* 1976 *Duke L.J.* 366 at 395-8. In that article, the editor refers to the view taken in *Robertson v. Butterfield* and like cases such as *Schapiro* and compares them with the construction of Exemption 3 as set forth by Judge MacKinnon in his dissent in *Schechter v. Weinberger* (D.C. Cir. 1974) 498 F.2d 1015, 1016. In that dissent, Judge MacKinnon assumed that Congress in enacting the FOIA was aware of the "extant" statutes prohibiting disclosure and reasoned that "[i]f Congress had not intended to include [a particular statute] within Exemption Three, it could easily have done so either by explicitly narrowing the coverage of the exemption or by amending" the statute in question. This construction of the Exemption is described as the "broadest" construction of the Exemption, "since it clearly rejects the notion that the FOIA can be read in any sense as repealing or modifying by implication a statute authorizing nondisclosure which existed prior to the enactment of the FOIA." *Ibid.,* at 396. The editor concludes that "[t]he construction of exemption 3 adopted by the Court in *Robertson* is similar in both

statute within the parameters of Exemption 3. But the conclusion seems inescapable that it was so considered. § 1905 certainly fitted the description of an "extant" statute as defined by the Supreme Court in *Robertson* and it represented the type of "general" prohibition of disclosure discussed therein. Moreover, the Court in *Roberston,* quoting from the legislative record, stated:

"* * * When the House Committee on Government Operations focused on Exemption 3, it took note that there are 'nearly 100 statutes or parts of statutes which restrict public access to specific Government records. *These would not be modified* by the public records provision of S.1160.'" (Italics in opinion) [31]

theory and consequence to the broad construction advanced by Judge MacKinnon." *Ibid.,* at 396.

Sears, Roebuck and Co. v. General Services Admin. (D.C. D. 1975) 402 F. Supp. 378, 381, n. 3 takes a contrary view but it is impossible to reconcile its conclusion with the decision of the Supreme Court in *Robertson* or of the Circuit Court in *Charles River Park.*

[31] *Ibid.,* 422 U.S. at p. 265.

In an early article on the FOIA, a writer anticipated the later ruling in *Robertson,* stating:

"There are nearly one hundred statutory provisions specifically restricting disclosure in one way or another. While they are phrased in various ways—such as specifically exempting from disclosure, prohibiting disclosure except as authorized by law, or providing for disclosure only as authorized by law—it is clear from the House Report that all of them are included in exemption (b)(3)."

Note, *Freedom of Information: The Statute and the Regulations,* 56 *Geo. L. J.* 18 at 33-4 (1967).

There can be little doubt that § 1905 was among those "nearly 100 statutes or parts of statutes * * * not * * * modified" or repealed by the FOIA and intended to be covered by Exemption 3, to which the Congress and the Court in *Robertson* referred. And the Attorney General in his Memorandum Opinion on the scope and application of the Act, as quoted in *Robertson v. Butterfield, supra,* 498 F.2d at 1033-4, n. 6, regarded § 1905 as such. Further, § 1905 had been earlier identified in legislative hearings as a statute which prohibited disclosure.[32] In *Weisberg v. Department of Justice* (D.C. Cir. 1973) 489 F.2d 1195, 1202, *cert. denied* 416 U.S. 993 (1974), an *en banc* decision of the very Circuit that had espoused the doctrine of *Schapiro,* the Court referred to the Regulations of the General Services Administration, as set forth in 41 C.F.R. § 105-60.604 (1972) for a listing of illustrative statutes considered to be within Exemption 3. The first statute on that list is § 1905.[33] Indeed, the Department of Labor itself has assumed that § 1905 is among the statutes incorporated

[32] *See* 1958 Hearings before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, pp. 985-7.

[33] 41 C.F.R. § 105-60.604 reads as follows:

"(a) 5 U.S.C. 552(b)(3) provides that the statute does not apply to matters that are specifically exempted from disclosure by other statutes. (For further discussion of this matter, see the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, (June 19, 1967), pages 31 and 31).

(b) The following are illustrative of such statutes, but are not all inclusive:

(1) 18 U.S.C. 1905 (trade and financial information provided in confidence by businesses).

* * *"

within Exemption 3, for in its Regulations on disclosure, it forbids any employee under its control or delegation to disclose any records or information within the prohibition of § 1905.[34] In fact, this Regulation of the Department of Labor, *by which the defendants in the stipulation in the United States Steel Case admitted they were bound, since they only act in these matters by delegation of the Department of Labor,* has the effect of law and would itself meet the qualifications of Exemption 3. And such was the specific holding in *Chrysler Corp. v. Schlesinger* (D. Del. 1976) 412 F. Supp. 171, 177, involving an identical claim to that asserted here, and being against the same defendants as in these cases.[35] In the *Chrysler Case,* the court said:

> "5 U.S.C. § 301 is the general statute providing for the promulgation of regulations for the use and custody of government records. Pursuant to

[34] 29 C.F.R. § 70.21(a) is as follows:

"Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law."

[35] 392 F. Supp. at 1250.

this statute, the Secretary of Labor promulgated 29 C.F.R. § 70.21(a) which is applicable to DSA as a delegate of powers of the Department of Labor's OFCC. (*See,* 41 C.F.R. § 60-1.6)."

We accordingly think the District Court in these cases properly found that § 1905 is a statute qualifying under Exemption 3, both specifically as one of the "100 or more" statutes included therein, and by incorporation thereunder of the applicable Regulation of the Department of Labor,[36] and could have decided the cases on that basis,[37] as we later indicate.

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[36] The author in the Note in 70 *Nw. U. L. Rev.* at 1016 would find § 1905 not to be a restriction on disclosure, "[b]ecause reliance on section 1905 would restrict unduly the court's ability to determine whether the information should be disclosed," and it "is perceived as a relic of an earlier age of government secrecy." It based this comment largely on a recommendation of the Sub-committee on Government Operations, made to the House Committee on the Judiciary, that § 1905 be repealed so that it would not be an impediment to disclosure. The Congress, however, has not repealed § 1905. This fact, under the reasoning of Judge MacKinnon in *Schechter,* note 28, which was adopted later in *People of State of California v. Weinberger* (9th Cir. 1974) 505 F.2d 767, 768, and received final approval in *Robertson,* would seem fairly conclusive evidence of legislative intent not to remove § 1905 as a prohibition against disclosure, qualifying as such under Exemption 3. In any event, in the absence of actual repeal, it is not, under Chief Justice Burger's language in *Robertson,* the function of courts to do what Congress has failed to do. We might note parenthetically, too, that the author at no point cites or refers to *Robertson,* which it would seem invalidates his conclusion.

Even if the author were correct in his analysis, the defendants would not be aided in their defense of these cases. The regulation of the Department of Labor, which they stipulated as controlling, incorporated the restrictions of § 1905 *eo nomine* and a violation of such regulations would justify relief in any event. *See United States v. Heffner* (4th Cir. 1969) 420 F.2d 809, 811-12.

[37] This was the criticism directed at the decision in *Charles River*

But whether the information be deemed exempt under the FOIA or prohibited from disclosure under § 1905, the defendants would deny completely any jurisdiction in the District Court to make a determination to that effect at the instance of the plaintiffs who were the suppliers of the information.[38] They contend the FOIA provides a procedure to compel disclosure and that is the *exclusive* remedy available under the Act. Under this argument, a requestor of government information, if denied access, is entitled under the Act to a *de novo* judicial hearing on his right to obtain the information but the Act not only does not give, it precludes any remedy in favor of a supplier of private "confidential" information to a governmental agency under statutory or administrative compulsion. The latter, under this argument, is completely remediless if the agency determines to release the information, despite the fact that such information be confidential private information, exempt under Exemption 4 and within the prohibition of disclosure under § 1905, which, if released, will inflict competitive injury on him. It would seem sufficient answer to this argument that this position of the defendants, though often

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by the writer in Note, *Developments Under the Freedom of Information Act—1974,* 1975 *Duke L. J.* 416, 428, n. 56, noted *infra.*

[38] We group § 1905 and Exemption 4 together because it has been uniformly held that the scope of § 1905 and Exemption 4 of the FOIA are, as stated in *Pharmaceutical Manufacturers Ass'n. v. Weinberger* (D.C.D. 1975) 401 F. Supp. 444 at 446, "the same," or, as put in *Ditlow,* 362 F. Supp. at 1324, "co-extensive." Accordingly, material qualifying for exemption under (b)(4) falls within the material, disclosure of which is prohibited under § 1905. And this was the specific holding in *Charles River Park* (519 F.2d pp. 941-2 and n. 7). *See, also,* n. 27, *supra.*

raised, has never been accepted by any court. As one commentator has concluded, after an exhaustive review of all the reverse-FOIA cases, "no court has [ever] failed to find jurisdiction," in such cases, though he adds "there has been substantial disagreement as to the proper basis for this finding." Note, *Protection from Government Disclosure—The Reverse-FOIA Suit,* 1976 *Duke L. J.* 330, 347; *see, also,* Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 *Nw. U. L. Rev.* 995, 999-1000; *Charles River Park "A", Inc. v. H. & U.D.* (D.C. Cir. 1975) 519 F.2d 935, 939; *Sears, Roebuck and Co. v. General Services Admin.* (D.C. Cir. 1974) 509 F.2d 527 (jurisdiction assumed without discussion); *Chrysler Corp. v. Schlesinger* (D. Del. 1976) 412 F. Supp. 171, 174-5; *Burroughs Corporation v. Schlesinger* (C.D. Cal. 1974) 384 F. Supp. 292, 294; *Westinghouse Electric Corporation v. Schlesinger* (E. D. Va. 1974) 392 F. Supp. 1246, 1248; *United States Steel Corp. v. Schlesinger* (E.D. Va. 1974) 35 Ad. L. 2d 790 jurisdiction assumed without discussion); *McCoy v. Weinberger* (W.D. Ky. 1974) 386 F. Supp. 504, 507-8; *Neal-Cooper Grain Company v. Kissinger* (D. D.C. 1974) 385 F. Supp. 769 (jurisdiction assumed without discussion); *Hughes Aircraft Company v. Schlesinger* (C.D. Cal. 1974) 384 F. Supp. 292, 294.[39] And this as-

[39] In *Neal-Cooper Grain Company v. Kissinger* (D.C. D. 1974) 385 F. Supp. 769, 775, the Court noted that in the District Court decision in *Charles River Park* (360 F. Supp. 212).

> "[t]he Court held that the FOIA did not apply to the case because it was passed for the benefit of parties seeking disclosure, apparently concluding that it thus had no relevance to a claim seeking to bar disclosure.

sumption of jurisdiction seems to have recently received approval in *Renegotiation Board v. Bannercraft Co.* (1974) 415 U.S. 1, 17. In that case, the same argument as is pressed by the defendants here was advanced, *i.e.,* that the remedy expressly given under the FOIA "constitute[s] the *exclusive* method" under the Act and "that any implication of other injunctive power * * * would be inconsistent with the statutory language." In answer, the Court, after noting "'the broad equitable jurisdiction that inheres in courts * * * where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest'"[40] held:

"The broad language of the FOIA, with its ob-

> "*Charles River* was one of the first 'reverse-FOIA' suits to come to the courts. Developments since that time have, in the opinion of the Court, made it clear that the FOIA does apply to such matters. In National Parks & Conservation Assoc. v. Morton, plaintiffs sought to compel disclosure of information which has been supplied to the government on a confidential basis. The District Court had granted summary judgment to defendant on the basis of the confidentiality exemption to the FOIA. The Court of Appeals remanded, saying that the lower court must examine the material to determine if the informational disclosure would either impair the Government's ability to obtain information in the future or harm the competitive position of the supplier of information. In so doing, the Court recognized both that the policy of the FOIA was to encourage disclosure and that the purpose of the confidentiality exemption was to protect the rights of suppliers of information. After Morton, there would seem little doubt that the FOIA does apply to a suit seeking to prevent disclosure."

[40] Quoting from *Porter v. Warner Holding Co.* (1946) 328 U.S. 395, 403.

vious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do, *Scripps-Howard, supra,* 316 U.S., at 17; and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, 5 U.S.C. § 552(a)(3), persuade us that the *Babcock* and *Switchman's Union* principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." (pp. 19-20)

It follows, therefore, that the supplier of information, protected from disclosure under the overall policy expressed in an exemption to the FOIA, or under a specific statutory prohibition such as § 1905, is not without a remedy, in a proper case, to challenge the right of an agency to disclose material furnished the agency under a claim of confidentiality; and the argument of the defendants to the contrary is without merit. The real issue thus becomes the type of remedy available to the supplier in such a case.

It is the defendants' position that, if the plaintiffs are entitled to any judicial remedy in these cases, it must be solely under the review procedures provided under the Administrative Procedure Act,[41] that there

[41] § 706, 5 U.S.C.

can be no other basis for subject-matter jurisdiction. This argument of the defendants seems to have been faced directly in but one reported case, *Charles River Park "A", Inc. v. H. & U.D.*[42] In that case, the Court began initially with the assumption that § 1905 did apply and, on that basis, found federal-question jurisdiction.[43] On reargument, however, it withdrew its holding to this effect, reasoning that "review under the APA, the normal method of reviewing agency action, is sufficient to safeguard any interests that section 1905 is supposed to protect."[44] To some extent, the Court was undoubtedly influenced in this conclusion by the previous rulings of the Circuit in *Grumman,*[45]

[42] 519 F.2d 935.

[43] *See, Pharmaceutical Mfrs. Ass'n. v. Weinberger* (D.C.D. 1976) 411 F. Supp. 576, 577, n. 1:

> "The published opinion in *Charles River Park* withdrew the slip opinion's observation (found in footnote 5) that 18 U.S.C. § 1905 created a private right of action. The court held instead that review under the Administrative Procedure Act is available."

It seems quite clear that had the Court in *Charles River Park* had the benefit of the later decision in *FAA v. Robertson,* it would not have receded from its initial decision that § 1905 provided a basis for federal subject-matter jurisdiction and would have granted the plaintiff the full evidentiary hearing to which such a proceeding would have entitled the plaintiff. In such an action, there would have been no basis for an APA review, since § 1905 does not admit of administrative discretion, the review of which is the purpose of APA review.

Cf., Note, 1976 *Duke L. J.* at 342 ("* * * section 1905 does not speak in terms of discretion * * *").

[44] 519 F.2d at 941, n. 6.

[45] 425 F.2d 578.

Schapiro[46] and similar cases, discussed *supra,* that § 1905 is not within Exemption 3, though it is interesting that the Court, somewhat reluctant to reaffirm completely *Schapiro* and *Grumman,* said somewhat cryptically that "5 U.S.C. § 552(b), does not incorporate section 1905 into the FOIA in such a way as to make section 1905 broader than the fourth exemption" and conclude with the statement that, "[s]ince only the FOIA's fourth exemption deals with matters covered by section 1905, consideration of section 1905 in FOIA cases is appropriate only when the information falls both within the fourth exemption and under section 1905."[47] In short, it construed § 1905 and Exemption 4 as "co-extensive" in scope[48] and held that, if the material were exempt from disclosure under Exemption 4 of the FOIA, it was automatically prohibited from

[46] 339 F. Supp. 467.

[47] 519 F.2d 941-2, n. 7.

It is of interest that *Charles River* is criticized in the Note, 1975 *Duke L. J.* at 428 as "a thoroughly unsatisfactory decision" and the rationale of its criticism was that "[t]he issue in the case should have been whether section 1905 specifically exempted the information from disclosure under the statutory exemption, 5 U.S.C. § 552(b)(3) (1970)—a position uniformly rejected by other statutes, see note 76 infra—and, if so, whether a private party can invoke the exemption." We agree, as we later indicate, that the applicability of § 1905 was a critical issue in that case, as it is in these cases. But, in *Charles River,* the panel was writing for a court, which, not yet supplied with the authoritative construction of Exemption 3 as declared in *Robertson* was bound by its earlier decisions giving that exemption a restricted application and assimilating § 1905 with Exemption 4 by finding that the two were "co-extensive."

[48] *Pharmaceutical Mfrs. Ass'n. v. Weinberger, supra,* 401 F. Supp. at 446; *Ditlow v. Volpe, supra,* 362 F. Supp. at 1324.

disclosure under § 1905.[49] And it held that this determination could be made through the review procedure made available under the APA, though, as one commentator has observed, "the court in *Charles River Park 'A', Inc. v. HUD* indicated that it would imply a private right of action under section 1905 in the appropriate situation."[50] *Charles River Park* thus is not authority for the proposition that the plaintiffs' remedy here is solely and exclusively under the APA simply because in that case it proceeded under the APA. In fact, any such rule would create a jurisdictional anomaly, under which a federal court in one district might afford the supplier a remedy which would be denied him in another federal district. This result follows from the great difference among the Circuits, and in the opinion of the commentators, on whether the APA confers federal subject-matter jurisdiction.[51] Such difference is illustrated by the de-

[49] O'Reilly, *ibid.,* 30 *Bus. Law.* at 1137, summarizes this ruling of the Court:

> "[a]fter a rejection of section 1905's use as a 'specifically exempted by statute' protection under the Freedom of Information Act, the *Charles River* opinion gave that confidentiality statute a new usefulness."

[50] Note, 1976 *Duke L. J.* at 350.

[51] This difference of opinion on whether the APA confers independent subject-matter jurisdiction, is illustrated in the contrary views of two respected commentators. Professor Davis in Administrative Law of the Seventies, § 23.02, p. 530 (1976 Supp.) finds the clear weight of authority in favor of subject-matter jurisdiction under the APA; 13 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3568, pp. 465-6 (1975 ed.) is equally certain that the "majority view" is expressed by those courts which have rejected the argument that the Administrative Procedure Act is a grant of jurisdiction.

cisions in *Charles River Park* and *Chrysler Corp. v. Schlesinger*. The first arose in the District of Columbia, where the rule prevails that the APA confers subject-matter jurisdiction;[52] the second arose in the Third Circuit, which has found that APA confers no such jurisdiction.[53] If the defendants were correct in their contention, the plaintiff in *Charles River Park* would have a remedy but the plaintiff in *Chrysler* would be remediless. It is inconceivable that such a disparity in rights could be sanctioned in a unified judicial system.[54]

Littell v. Morton (4th Cir. 1971) 445 F.2d 1207, 1212-13; *McEachern v. United States* (4th Cir. 1963) 321 F.2d 31, 33, and *Deering Milliken, Inc. v. Johnston* (4th Cir. 1961) 295 F.2d 856, 865, it seems support the view that in this Circuit the APA is regarded as granting federal subject-matter jurisdiction; at least Hart & Wechsler, *The Federal Courts and the Federal System*, p. 1161, n. 6 (1973 ed.) so construe *McEachern*, and *Ortego v. Weinberger* (5th Cir. 1975) 516 F.2d 1005, 1011, finds *Littell* to recognize that the APA confers jurisdiction. However, the District Court decisions in this Circuit, as well as those outside, "are approximately equally divided on whether the APA is an independent jurisdictional grant." 516 F.2d at p. 1011. *Compare, Etheridge v. Schlesinger* (E.D. Va. 1973) 362 F. Supp. 198, 200-1; *River v. Richmond Metropolitan Authority* (E.D. Va. 1973) 359 F. Supp. 611, 622, *aff'd.* on other grounds, 481 F.2d 1280, and *Garmon v. Warner* (W.D. N.C. 1973) 358 F. Supp. 206, 208 (all sustaining jurisdiction under APA), with *International Fed. of P. & T. Eng., Loc. No. 1 v. Williams* (E.D. Va. 1974) 389 F. Supp. 287, 291, *aff'd.* without opinion, 510 F.2d 966; *Hagedorn v. Union Carbide Corporation* (N.D. W.Va. 1973) 363 F. Supp. 1061, 1063, and *Yahr v. Resor* (E.D. N.C. 1972) 339 F. Supp. 964, 967, *aff'd.* on other grounds, 431 F.2d 690 (all to the contrary, denying subject-matter jurisdiction under APA).

[52] 519 F.2d at 939.

[53] 412 F. Supp. at 174-5.

[54] It was this very uncertainty of a remedy, arising if the APA were held to be the exclusive procedure available to the supplier of

But even if the method of review under the APA as approved in *Charles River Park* were followed in these cases, the procedure would not have been substantially different from the procedure actually followed by the District Court. The only action taken by the District Court at trial, to which the defendants object, is that it held an evidentiary hearing in these cases and received evidence from both plaintiffs and defendants on the single issue of "confidentiality" of the information under review, as defined in *National Park and Conservation Ass'n. v. Morton, supra,* 498 F.2d 765.[55] They contend the District Court was forbidden from holding such evidentiary hearing and was

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information, that caused the writer of the Note in 70 *Nw. U. L. Rev.* at 1007 to opt for a § 1331 action. He said:

> "The uncertainty of the APA as an independent jurisdictional grant makes the statutory grant of 'federal question' jurisdiction in section 1331 of Title 28 of the United States Code the most likely basis for jurisdiction in reverse-FOIA suits."

[55] This definition of "confidentiality" as stated in *Morton,* is:

> "To summarize, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (p. 770)

For an exhaustive review of the progress in development of the definitive standard for construing the terms of Exemption 4 of the Act, *see* Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act,* 60 *Cornell L. Rev.* 109, 113 (1974), and *Ibid.,* 74 *Colum. L. Rev.* at 948-53.

There is, also, an extensive note on this exemption in 21 A.L.R. Fed. 224, *et seq.,* and it is discussed at length in 41 *U. Chi. L. Rev.* at 572-5, as well as Note, 9 *Akron L. Rev.* at 675-81.

required to render its decision on the administrative record, consisting almost entirely of the agency's *ipse dixit* that the information in question was disclosable under the Act and was not protected under either Exemption 4 or § 1905. Specifically, their position is that the District Court had no right to receive any evidence on the qualification of the challenged material as "confidential" under the standard mandated in § 1905 and Exemption 4, which, according to the decisions, as we have seen, are the "same" or "co-extensive." [56]

Charles River Park, however, holds exactly to the contrary: it declares that, even in an APA review, the District Court should have an evidentiary hearing to determine whether, on the evidence adduced, the challenged material is "confidential" and thereby exempt from disclosure under Exemption 4 and prohibited from disclosure under § 1905. In that case, the Circuit Court did not instruct the District Court to look to the administrative record, or the decision of the agency, in order to determine whether the information in question was "confidential" and thus within the exemption prohibited by Exemption 4 of the FOIA, and within the prohibition of § 1905; on the contrary, it directed the court to follow the following procedure on remand:

> "* * * Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. See 5 U.S.C. § 552(b)(3);

[56] *See, Pharmaceutical Manufacturers Ass'n. v. Weinberger,* 401 F. Supp. at 446; *Ditlow v. Volpe,* 362 F. Supp. at 1324.

> National Parks & Conservation Assn. v. Morton * * *. In holding this hearing, the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all." [57]

It went on to add that, on remand, the District Court should "consider 18 U.S.C. § 1905 and determine whether the information sought falls within the specific prohibitions therein contained," previously stated as "co-extensive" with Exemption 4. And it added that, "[i]f it does, it would be an abuse of discretion for HUD to release the information" and "to ignore such a statutory mandate." It concluded by remanding the cause because "[a]n evidentiary hearing will be necessary since the present record is not sufficient to make the above determination." [58]

[57] 519 F.2d at 940-41, n. 4.

What the court is stating here is that, until it is determined that the information is within an exemption, the agency has no discretion to exercise and no basis for review under the APA. This is what it describes as the "threshold" question. This follows, since if the information is not exempt, the Act commands disclosure; but, if, on the other hand, the information is exempt, then the agency ordinarily has discretion, the exercise of which is reviewable under APA standards.

See, also, Note, 1976 *Duke L. J.* at 345, n. 73:

> "The court of appeals in *Charles River,* however, directed the lower court on remand to hold an evidentiary hearing on the threshold question of whether the information is exempt under the FOIA."

[58] 519 F.2d at 942-3.

As construed in *Pharmaceutical Mfrs. Ass'n. v. Weinberger, supra,* 411 F. Supp. at 577-8, *Charles River Park,* in remanding the case, directed the District Court to follow "[a] three step process * * *: determination of whether the material fit within a FOIA

It follows that, were review here available under the APA, the procedure followed by the District Court was free of error.[59] But the District Court did not find

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exemption; consideration of the prohibitions of 18 U.S.C. § 1905; and (assuming the pertinence of a FOIA exemption and the inapplicability of 18 U.S.C. § 1905) examination of the agency's discretionary decision to release. 519 F.2d at 943. Such judicial review is under the Administrative Procedure Act and appropriate remedies include injunctive relief. 519 F.2d at 939, 941-42 & n. 6."

See, also, Burroughs Corporation v. Schlesinger (E.D. Va. 1975) 403 F. Supp. 633 at 637, where Charles River Park was construed:

> "* * * The Circuit Court for the District of Columbia has suggested that a District Court hold appropriate hearing whenever evidence is insufficient on the issue of substantial harm. *Charles River Park "A", Inc. v. H.U.D., supra,* 519 F.2d at 940, 943-944 (D.C. Cir. 1975). This suggestion is well taken. The defendants, in the meantime, shall remain enjoined from disclosing the Recap Table pending a final decision after such hearings are held."

[59] We may add that, even when review is sought under the APA, the plea of sovereign immunity, as asserted by the defendants, will not be sustained. The defendants rely on *Littell v. Morton* (4th Cir. 1971) 445 F.2d 1207. Their reliance in this regard on *Littell v. Morton* is misplaced. It is true that in *Littell* we did not follow the lead of those cases which had found in the APA itself a waiver of sovereign immunity. But we took note of the increasing judicial distaste for the doctrine of sovereign immunity and the unanimous condemnation of the doctrine by academic commentators. We accordingly narrowed the doctrine in actual application within a very restricted compass, as established by its rational justification. We stated that, under the impetus of an increasing "weakening of general faith in the validity of the doctrine" its only remaining "rationale [for existence] boils down to substantial bothersome interference with the operation of government." *Ibid.*, at 1214.

This statement is not substantially different from that articulated by Professor Cramton in his notable article, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant,* 68 *Mich. L. Rev.* 389 at 397 (1970):

jurisdiction under the APA in these cases; its jurisdictional base rested upon the general federal-question jurisdiction under § 1331.[60]

§ 1331 grants original jurisdiction to the District Court over any action that "arises under the Constitution, laws, or treaties of the United States." And we agree with the trial court that these cases meet the jurisdictional requirements of § 1331. The information, the disclosure of which the plaintiffs seek by their action to prevent, was filed under the compulsion of a valid Executive Order issued under federal authority; the disclosure of such information, it was alleged, is exempt from compelled disclosure under the terms of both subsections § 552(b)(3) and (4) of the FOIA and its

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> "* * * The only rationale for the doctrine [of sovereign immunity] that is now regarded as respectable by courts and commentators alike is that official actions of the Government must be protected from undue judicial interference."

These suits, if sustained, will not interfere in the slightest with the performance by the Government or its agents under the Executive Order; any decree entered herein would not curtail the power of the Government to enforce the Executive Order. Actually, the Government itself has no real interest in these suits; the only parties that may suffer are the plaintiffs through the disclosure of confidential information harmful to their competitive position and the only parties to be benefitted, if the plea is sustained, are the private parties who for their own personal curiosity desire the information. *Littell* can accordingly give them no support; on the contrary, it is compelling authority against the validity of the plea. The editor in the Note, *supra,* 1976 *Duke L. J.* 358, concludes also that *Littell* would not bar a suit such as these reverse-FOIA cases.

[60] *See, Burroughs Corporation v. Schlesinger, supra,* 403 F. Supp. at 634; *Chrysler Corp. v. Schlesinger, supra,* 412 F. Supp. at 174-5; and *Hughes Aircraft Company v. Schlesinger, supra,* 384 F. Supp. at 294.

disclosure is forbidden under § 1905, 18 U.S.C. On the basis of those allegations, the plaintiffs invoked the equitable jurisdiction of the federal court to secure an injunction against disclosure. Such jurisdiction, it would seem, would exist both as an action to enjoin the violation of the positive mandate of § 1905 by an executive officer and as an action implied under the very terms of Exemption 4 of the FOIA itself. Both such grounds would rest on a federal statute and qualify under § 1331.

It would be a violation of both logic and reason to find that an action by one who is faced with substantial competitive harm and injury by the threat of disclosure of information, submitted by him solely because of the compulsion of a federal Executive Order, validly issued under federal law by a federal agency, whose officers are forbidden by federal law to disclose such information (as does § 1905), is not an action arising "under the * * * laws, * * * of the United States." It has been well stated that "[i]t is an inherent power of the federal judiciary to enjoin * * * an act" sought to be carried out by a federal official in violation of federal law, and "[t]hat there be such [judicial] power was one of the prime compelling reasons for the creation of the judicial branch as an independent and equal branch of the Government."[61] And this power of a federal court to grant injunctive and declaratory relief under § 1331 against the threat of action by a public officer "in excess of [his] delegated powers and contrary to a specific [federal statutory] prohibition"

[61] *Fleming v. Moberly Milk Products Co.* (D.C. Cir. 1947) 160 F.2d 259, 264, appeal dismissed 331 U.S. 786 (1946).

such as § 1905, causing irreparable harm to a private person, has been repeatedly recognized and exercised.[62] The principle is plainly applicable in actions such as these under review and affords federal subject-matter jurisdiction under § 1331(a).[62a]

We accordingly have, as we have said, no difficulty in finding that the District Court had jurisdiction of these actions under § 1331 to enjoin an action by the defendants in violation of § 1905.

Should, however, the contention of the defendants be accepted that § 1905 is inapplicable, the FOIA itself, it would seem, confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within

[62] *Leedom v. Kyne* (1958) 358 U.S. 184 at 188-90; *Borden, Inc. v. F.T.C.* (7th Cir. 1974) 495 F.2d 785, 787, ("the agency has clearly violated a right secured by statute or agency regulation"); *Elmo Division of Drive-X Company v. Dixon* (D.C. Cir. 1965) 348 F.2d 342, 344-6.

See, also, McQueary v. Laird (10th Cir. 1971) 449 F.2d 608, 611, *Zirin v. McGinnes* (3d Cir. 1960) 282 F.2d 113, 115, *cert. denied* 364 U.S. 921 (1960), and *Green v. Connally* (D.C. three-judge ct. 1971) 330 F. Supp. 1150, 1172, *aff'd. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

In *McQueary*, the court said:

> "If a federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred, equity has jurisdiction to restrain him."

Green is perhaps more forceful:

> "The Federal courts have power to correct improper or inadequate action of Federal officials not only, as in the case of State officials, for failure to observe constitutional limits, but also for failure to act in consonance with pertinent Federal legislation."

[62a] The District Court found the presence of the jurisdictional amount under § 1331 and the defendants have not contested this finding of jurisdictional amount.

Exemption 4. To understand this exemption and to determine its scope and application, we must look first to the legislative intent or purpose in enacting the FOIA itself. It is clear that the Act's basic purpose "was to protect the people's right to obtain information about their government, to know what their government is doing and to obtain information about government activities and policies" and to remedy the "mischief" of "arbitrary and self-serving withholding, by agencies which are not directly responsible to the people, of official information on how the government is operating through the use of vague phraseology in Section 3 of the Administration Procedure Act." [63]

[63] Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 *Akron L. Rev.* 673, 694 (1976). The full text on this point is:

> "One factor which seems to have received little attention in analyzing the purpose of Exemption 4 is that the mischief which Congress was attempting to remedy was the arbitrary and self-serving withholding, by agencies which are not directly responsible to the people, or official information on how the government is operating through the use of vague phraseology in Section 3 of the Administrative Procedure Act. The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are.
>
> "Disclosure of any information which corporations have traditionally kept secret for valid competitive reasons strikes at the heart of the free enterprise system and was undoubtedly what Congress intended to guard against when, in expressing the purpose of Exemption 4, it stated:
>
> " 'This exception is necessary to protect the confidentiality

"One cannot, however, review the hearings and committee reports accompanying the FOIA without recognizing that Congress was also deeply concerned with protecting an individual's right of privacy and thus designed some of the exemptions to accommodate what it perceived to be legitimate private as well as governmental interests." [64] (Italics in text) In drafting the Act, Congress sought carefully to balance the right of the public to know what its government was doing against the rights of the individual to the privacy of private confidential information [65] and to make clear

> of information . . . which would customarily not be released to the public by the person from whom it was obtained.' "

[64] The full text of this part of the Note in 1975 *Duke L. J.* at 431-2, is as follows:

> "One cannot, however, review the hearings and committee reports accompanying the FOIA without recognizing that Congress was also deeply concerned with protecting an individual's right of privacy and thus designed some of the exceptions to accommodate what it perceived to be legitimate *private* as well as governmental interests. Tests devised by courts interpreting the exemptions dealing with privately submitted material to determine whether certain information can be withheld under those exemptions have incorporated this desire to protect legitimate private interests, probably with the expectation that an agency will respect such interests and assert the exemption for their protection. * * * *Where the exemption was intended to protect the asserted private interest, an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information.*" (Italics added)

[65] *See*, S. Rep. 813, 89th Cong., 1st Sess. (1965):

> "The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interest of confidentiality."

the distinction between the right of the public to information and the right of the individuals to protection from disclosure of certain confidential private information. In summary, the Act was intended, to use the language of the Senate report, to set "up workable standards for what records should and should *not* be open to public inspection."[66] (Emphasis added) And one of the sections of the Act, which declared what private information acquired by the government "should *not* be open to public disclosure" was Exemption 4. That exemption declared that "commercial or financial information obtained from any person and privileged or confidential" should "*not* be open to disclosure." And, as we have already seen, the term "confidential," as used in the statute, covers information, the release of which would "cause substantial harm to the competitive position of the person from whom the information was obtained."[67] The protection from disclosure given such information by Exemption 4 was stated in the legislative hearings to have been granted to such information "*not only as a matter of fairness, but as a matter of right,* and as a matter basic to our free enterprise system."[68] (Italics added) In enacting such exemption, the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private interest.[69] This pro-

[66] S. Rep. No. 813, 89th Cong., 2d Sess. at p. 5 (1965).

[67] *See* 498 F.2d at 770.

[68] 498 F.2d at pp. 767-69, quoting from the Senate hearings.

[69] The author in 70 *Nw.U. L. Rev.* at 1017 is somewhat more limited in his approach. Under his construction of the Act and its

vision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest. And when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in express terms accord him that right. *Bannercraft,* as we have seen, disposed of the contrary argument by declaring that, in addition to the express grant of jurisdiction in the Act itself, there was available to any proper party the right to invoke the broad general jurisdiction of equity in the assertion of a right under the Act. And this would cover the right of the private party seeking the protection given by Exemption 4. The Court said as much in *National Parks and Conservation Ass'n. v. Morton, supra,* 498 F.2d at 770. It declared that "[t]he exemption [*i.e.,* Exemption 4] may be invoked for the benefit of

policies, an agency, if it chose to disclose material falling within Exemption 4, would be under a "burden • • • to demonstrate that the public interest requires disclosure of an individual's confidential information," and "absent a strong, countervailing public need to know," injunctive relief against disclosure is appropriate. The defendants made no such showing in this case. In fact, they made no real defense in *Westinghouse, see* 9 *Akron L. R.* at 683, and certainly not on this ground in the other cases. Even if the courts may engage in a balancing of interests, despite the prior balancing by Congress, there was no basis for such balancing in this case, as we later indicate.

the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position."[70] The Court in *Sears, Roebuck & Co. v. General Services Adm'n.* (D.C.D. 1974) 384 F. Supp. 996, 1001, echoed the same thought, putting it that "[a] decision to release information is no less susceptible to court review than a decision to deny disclosure." *Sears* was reversed in part and affirmed in part in 509 F.2d 527, but in so doing the Court of Appeals' decision has been construed as holding *"that a person submitting information to the government can invoke the FOIA exemptions to enforce nondisclosure of exempt material."*[71] (Italics added)

And the idea that the supplier of private information which may fall within Exemption 4 is entitled to seek independent judicial protection under the federal-question jurisdiction statute is approved generally by the legal commentators. Thus, in a recent Note in 70 *Northwestern L. Rev.* 995 (1976), titled *"Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,"* the author states (pp. 998-9):

> "Although *National Parks* demonstrated a clear congressional intent to exclude confidential business materials submitted to a Government agency from the disclosure requirements of the FOIA, it is not clear *who* was intended to enforce that

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[70] *See, Neal-Cooper Grain Company v. Kissinger, supra,* 385 F. Supp. at 775, as quoted *supra,* n. 41.

[71] Note, 1975 *Duke L. J.* at 429, n. 60.

right, the agency or the individual whose materials may be disclosed. Several reasons exist for preferring private civil actions over agency enforcement. First, from the perspsective of an individual required to submit information to the Government, the agencies cannot always be relied upon to protect adequately the confidentiality of that information. One commentator has stated: [O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 *Bus. Lawyer* 1125, 1134 (1975)]

> 'Counsel for the agency, prime target of the disclosure-oriented FOIA has little or no incentive to protect the secrets of the business community. Exemption (4) [trade secrets and commercial or financial information] does not require confidentiality but leaves the burden on the agency to assert it. It may be bad for appearances in a period of "openness" and "honesty" for an agency to refuse disclosure from its files.'

"Moreover, the individual is more aware than the agency of the potential competitive harm he will suffer should information be released. Self-representation theoretically insures the plaintiff of both zeal and expertise in the advancement of this claim of confidentiality. Finally, an individual seeking to prevent disclosure may find his administrative remedies either nonexistent or inadequate. Virtually all agency regulations implementing the FOIA provide administrative appeal procedures for a decision to withhold information.

However, virtually no agency has established appeal procedures for a decision to disclose information.

"Therefore, absent the availability of reverse-injunctive suits, individuals would be unable to prevent effectively the economic injury to their businesses that could result from the release of trade information to a competitor. Such a check on agency action, it should be noted, is consistent with the FOIA's attempt to balance the goal of agency disclosure against the need to combat administrative arbitrariness and to protect certain rights of privacy and confidentiality." [72]

The same thought was set forth in the Note in 1975 *Duke L. J.* at 431-2:

[72] In this same article, the author, in developing the principle under which a supplier may directly challenge a decision to disclose exempt material, basing federal jurisdiction under § 1331 on the FOIA itself, said (p. 1011):

"It seems clear, therefore, that the FOIA does not automatically require relief for the reverse-FOIA plaintiff, because the Act does not forbid disclosure of exempted materials. Thus, relief must be predicated upon an indirect application of the FOIA in light of the policies underlying the Act and its exemptions. If a particular disclosure would be contrary to a policy of the Act, a court may properly find that an agency 'abused its discretion' in deciding to release the information —an approach coupling the policy considerations of the FOIA with the remedial provisions of the APA."

And then to make it clear, he is referring primarily to Exemption 4, the author adds in footnote 92:

"* * * For the policies, especially in a fourth exemption confidentiality question, may lead a court to conclude that a particular disclosure constitutes an abuse of agency discretion and therefore may be enjoined."

"* * * Where the exemption was intended to protect the asserted private interest, (which, we interpolate, was the obvious purpose of Exemption 4) an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information."

Actually, there seems to be no real dispute over the right of the private party to be protected from the disclosure of private confidential information qualifying under Exemption 4. The only issue is, as the writer of the article in *Northwestern Law Review* suggests, whether it is the agency or the private party who may invoke it. The writer of the Note in *Duke Law Journal,* just quoted, goes further and states that the "agency should respect the desire of the person submitting the information," and when the supplier claims the exemption, the agency should refuse disclosure. This suggestion seems to have been in the mind of the writer of the Note in 41 *University of Chicago Law Review* at 574, when he indicated that the agency should respect the claim to confidentiality under the exemption, thereby precipitating an action by the requestor, whereupon the supplier of the information could intervene in that action and secure a *de novo* trial on the confidentiality of the information under the Act. This, to say the least, is the circuitous way of protecting the rights of the supplier of the information. Moreover, there is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the

competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof,[73] and one "basic to our free enterprise system." Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that

[73] In 9 *Akron L. Rev.* at 683-4, the writer states:

"• • • Although there may be instances in our highly regulated economic system when basic economic principles no longer effectively operate, the industrial sector is still highly competitive. Corporations have varying numbers of market and financial specialists who continually search out fragments of information about competitors and markets from any available source; published government statistics and information, various legislative documents, analyses and surveys performed by consultants, field surveys performed by corporate specialists, information continually obtained and reported by sales personnel, or disclosures by government agencies. Since government-derived information is often submitted according to statutory or regulatory requirement, it is usually more credible than information from other sources; the latter usually depends on what a company decides, for its own carefully considered reasons, to make available. An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and could conceivably mean the difference between success or failure in certain contract bidding situations. The importance of a court's decision on disclosure in any given case is magnified by the fact that a number of jobs and possibly the future of a business may hinge on obtaining a given contract, depending on the industry involved and a number of other factors."

right to protection from disclosure assured him under Exemption 4, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him "not only as a matter of fairness but as a matter of right," seeks what may be regarded as correlative relief? This right was given him in *Charles River Park,* though incident to an APA review.[74] That it qualifies under statutory federal-question jurisdiction is the conclusion of the writers of the Notes in 1976 *Duke Law Journal* at 351-2 and in 70 *Northwestern Law Review* at 1008. In the latter Note, the editor states:

> "Although no clear test for deciding whether an action 'arises under' federal law has been developed, it can safely be said that a substantial claim based on an interpretation of a federal statute is sufficient to satisfy the arising under requirement. *In a reverse-FOIA suit, the plaintiff's claim for relief requires a determination of what commercial and financial information is confidential within the meaning of section 552(b)(4). Thus, it seems clear that such an action arises under federal law for purposes of statutory federal question jurisdiction.*" (Italics added)

[74] 519 F.2d at 940, n. 4:

"• • • Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure."

We agree. In our opinion, federal-question jurisdiction does exist for an implied action by the private party to protect his right to protection from disclosure, stated as a general over-all legislative policy in Exemption 4 of the FOIA.

Nor would the plea of sovereign immunity, so earnestly argued by the defendants, be any more available, where jurisdiction is invoked under § 1331, than it would be in an APA suit, to which we have already adverted."[75] It has been long accepted that an action to enjoin a federal official from doing an act beyond his statutory power or authority—the situation here where the threatened disclosure is alleged to be violative of the prohibition imposed upon the defendants both by § 1905 and by Department regulations—and violative of a right of privacy granted under Exemption 4 of the FOIA—represents an exception to the application of the plea of sovereign immunity. This was made clear in *Larson v. Domestic & Foreign Corp.* (1949) 337 U. S. 682, 689, *reh. denied* 338 U. S. 840 (1949), in which the Court said that, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. * * * His actions are ultra vires his authority and therefore may be made the object of specific relief."[76] This exception to the right of sovereign immunity has been often applied. Indeed, in *Ragland v. Mueller* (5th Cir. 1972) 460 F.2d 1196, 1197, a plea of sovereign immunity in a case for injunc-

[75] See note 59, *supra*.

[76] *See* Cramton, 68 *Mich. L. Rev.* at p. 404.

tive relief against proposed official action in violation of law was dismissed as "border[ing] on the frivolous." And in *De Masters v. Arend* (9th Cir. 1963) 313 F.2d 79, 85, *appeal dismissed* 375 U. S. 936 (1963), the Court said:

> "* * * However, it appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the doctrine of sovereign immunity."

Recent cases to the same effect are *Eastern Kentucky Welfare Rights Org. v. Simon* (D.C. Cir. 1974) 506 F.2d 1278, 1282, *cert. granted* 421 U.S. 975 (1975); *Bowers v. Campbell* (9th Cir. 1974) 505 F.2d 1155, 1158; *State Highway Commission of Missouri v. Volpe* (8th Cir. 1973) 479 F.2d 1099, 1123. And other courts have specifically held that the doctrine was inapplicable where an agency or officer was proposing to take action illegal under any statute prohibiting disclosure of information exempt under FOIA.[77]

Since these actions find their jurisdiction properly based on § 1331 and since the doctrine of sovereign immunity is not applicable, the District Court properly received evidence, even though the evidence was largely expert testimony calculated to inform the court of the nature of the information so that the court could better determine whether it fell within the statutory definition

[77] *Charles River Park "A", Inc. v. Department of H. & U.D., supra,* 519 F.2d at 941, n. 7; *Sears, Roebuck & Co. v. General Services Admin., supra,* 509 F.2d at 529 and *Neal-Cooper Grain Company v. Kissinger, supra,* 385 F. Supp. at 776.

of Exemption 4 and the statutory language of § 1905. This was specifically held in *Sears, Roebuck and Co. v. General Services Admin., supra,* 402 F. Supp. at 382-3. In that case, the issue was "the standard to be applied by this Court in its review of the agency's decision" to disclose. The court stated that all parties agreed that the FOIA directed a *de novo* review where the agency's decision not to disclose was challenged. It recognized that if review were being had under the APA, the agency's decision could only be reviewed on the ground of whether it was "arbitrary and capricious." "But," it declared, "since Sears has filed a valid declaratory judgment action on whether any of the documents are exempt under the FOIA, this Court will apply the *de novo* standard mandated by the Information Act" for resolving the issue whether the information is exempt. Actually, this is substantially the same procedure approved by *Charles River Park* for proceedings in this regard under the APA, as we have seen.[78] It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action for the benefit of the plaintiffs, is to be construed and applied by the executive, with only a right of review for arbitrariness on the part of those for whose benefit the statutes were enacted. This would be tantamount to committing the execution of such law to "the self-restraint of the executive branch" itself, *see*

[78] *See* 1976 *Duke L. J.* at 334, n. 18:

> "In Charles River Park 'A', Inc. v. HUD, 519 F.2d 935 (D.C.Cir. 1975), it was determined that the scope of the court's inquiry on the issue of whether the information is within an exemption should be that of de novo review."

Fleming v. Moberly Milk Products Co., supra, 160 F.2d at 265, and making the executive's *ipse dixit* final, *see Weisberg v. Department of Justice, supra,* 489 F.2d at 1202. It would be grossly unfair, as we have already said, to force the supplier of information which carries some indicia of confidentiality under both § 1905 and Exemption 4, to rely wholly on the agency. Such a ruling limiting the supplier to a challenge of arbitrariness alone against the agency's decision to disclose would be contrary to the whole thrust of the FOIA, since "because the FOIA was enacted expressly to combat administrative arbitrariness, Congress clearly did not intend to commit the disclosure decision totally to agency discretion;" and this was stated to be true in the reverse-FOIA case.[79] The supplier, if his claim to protection is as *Morton* declared a "matter of right," is entitled to a fair and adequate hearing, on proper evidence, in the courts, one that is no less broad and adequate than that given the merely curious who may seek disclosure. To repeat, when the issue is whether certain information is without a prohibition of disclosure, whether because "confidential" within both § 1905 and Exemption 4 or because of national security privilege, it is for the court itself to determine "whether the circumstances are appropriate for the claim" and not the executive department concerned and "the courts must be satisfied from all the evidence and circumstances," that the information is within or without the prohibition or privilege. This is so, because "[j]udicial control over the evidence in [such] a case cannot be

[79] 70 *Nw. U. L. R.* at 1004.

abdicated to the caprice of executive officers." *United States v. Reynolds* (1953) 345 U.S. 1, at 8-10.[80]

Nor can the defendants fault the findings of fact as made by the District Court to the effect that the information ordered not to be disclosed qualified as "confidentially" exempt under Exemption 4 and within the prohibition of § 1905. In fact, they make no assault in their briefs in this Court on the District Court's factual findings. Nor would it be easy for them to do so. It is in the record of the trial of the consolidated cases that the defendants conceded that in the earlier *Westinghouse Case* the District Court had properly determined the confidentiality issue "[o]n the evidence he had before him." And the defendants have otherwise conceded that some of the material in the reports in question was exempt from disclosure under Exemption 4 and they refused to disclose for that reason. They reaffirmed this in *Robertson v. Department of Defense* (D.C.D. 1975) 402 F. Supp. 1342, 1345, where in an action involving similar reports filed by the plaintiff General Motors, the Court stated the defendants "have taken the position that certain portions of the documents are confidential commercial or financial data which, if released, could injure GM's competitive position and are exempt from disclosure under the fourth exemption. Other portions would be disclosed were it not for the Virginia injunction. These defendants have not taken any position on the two motions presently before the Court—that of GM for summary judgment and Robertson for partial summary judgment." It is

[80] This case was cited with approval to this point in *Nixon v. United States* (1974) 418 U.S. 683, 715.

true that the District Court extended protection beyond that agreed upon by the defendants but, in so doing, the District Court was making a finding of fact, based on an *in camera* examination of the reports, and the defendants offer no reason to suggest that such a finding was erroneous on the record before the District Court. After all, the factual issue is complex and is a matter that must be left to the informed judgment of the District Court. We, therefore, find no error in the procedure followed in these cases by the District Court, or the result reached, and this would be true whether jurisdiction was being exercised under the APA or under § 1331.[81]

We accordingly affirm the grant of injunctive relief in favor of the plaintiffs and sustain the denial of declaratory relief as provided in the judgments of the District Court, for the reasons stated herein.

The decisions of the District Court in the three cases therefore are

AFFIRMED.

[81] In the Note in 1975 *Duke L.J.* at 432, n. 72, the author states:

"• • • The weakness in the *Westinghouse* and *United States Steel* opinions is in their implication that exemptions compel the withholding of all information which would qualify as exempt, regardless of a request by a private party for nondisclosure."

This statement is somewhat inexplicable, since the plaintiffs did object both administratively and by the institution of these actions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

WESTINGHOUSE ELECTRIC CORPORATION, ET AL., PLAINTIFFS, *v.* JAMES R. SCHLESINGER, ET AL., DEFENDANTS.	CIVIL ACTION No. 118-74-A

MEMORANDUM OPINION

This is an action brought by a corporation (Westinghouse) and its subsidiary (Fraser & Johnston) to prevent threatened disclosure of certain documents which those entities have filed with governmental agencies. The documents are an Employer Information Report (EEO-1) filed by a Westinghouse facility in East Pittsburg, Pennsylvania, and an Affirmative Action Program (AAP) filed by Fraser & Johnston with the Defense Supply Agency or the Office of Federal Contract Compliance (OFCC) or a Joint Reporting Committee. The EEO-1 is required to be filed by 41 CFR § 60-1.7 and the AAP is required to be developed by 41 CFR § 60-1.40. These regulations were promulgated by the Secretary of Labor pursuant to Executive Orders 11246 and 11375 and relate to the "promotion and insuring of equal opportunities for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors * * * ." 41 CFR § 60-1.1.

The Hill House Association (Hill), on October 17, 1973, requested the release of the latest EEO-1 form filed by the Westinghouse facility. Earlier the Legal Aid Society of Alameda County (Alameda) had requested release of Fraser & Johnston's 1972 AAP. The recipients of the requests in each instance notified Westinghouse and Fraser & Johnston of the requests. These companies objected to the releases and after an exchange of correspondence and meetings between the companies and the agencies, the latter determined on November 30, 1973, to release the AAP of Fraser & Johnston and on February 13, 1974, to release the EEO-1 of Westinghouse. This action was filed on March 6, 1974.

By agreement of the parties, a temporary restraining order was entered on March 8, 1974, and the case was set for hearing of the application for a preliminary injunction on March 27, 1974, the Court also advancing the trial of the action on the merits to that date and consolidating it with the hearing on the application.

The case was tried on March 27, 1974 as scheduled, Alameda and Hill having in the meantime moved to intervene as parties defendant. The other parties consented to the intervention and the intervenors participated in the trial.

Initially the defendants contest the jurisdiction of the Court. While numerous grounds of jurisdiction are asserted by the plaintiffs,[1] the Court finds that jurisdiction exists under 28 U.S.C. § 1331, the injury sought to be prevented being sufficiently alleged in the

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[1] 5 U.S.C. §§ 702, 704; 38 U.S.C. § 1337; 38 U.S.C. § 1346; 28 U.S.C. §§ 2201-02; 28 U.S.C. § 1331.

complaint as being in excess of the requisite jurisdictional amount, and the action arising under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, under the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and under 18 U.S.C. § 1905.

The defendants also, of course, raise the defense of sovereign immunity. They say that while the action is nominally against the federal officers who head the agencies involved it is actually one against the United States. The Court concludes that the relief sought, if granted, would not "expend itself on the public treasury or domain, or interfere with the public administration" to the extent that the Government would be "stopped in its tracks." *Land* v. *Dollar,* 330 U.S. 731, 738 (1947); *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682, 704 (1949); and that the actions of the federal officers are sufficiently alleged to be beyond their statutory powers so that those actions would not be the actions of the sovereign. *Dugan* v. *Rank,* 372 U.S. 609, 621 (1963).

Plaintiffs base their claim for relief on certain exemptions from required disclosure contained in 5 U.S.C. § 552, and on 18 U.S.C. § 1905 which, although a criminal statute making unlawful certain disclosures, is invoked civilly to effectuate the congressional purpose. *Wyandotte Co.* v. *United States,* 389 U.S. 191, 202 (1967); *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964).

Insofar as the exemptions provided by the Freedom of Information Act are concerned, the Court does not base its decision on the exemption contained in 5 U.S.C. § 552(b)(3) for matters "(3) specifically exempted from disclosure by statute," although the plaintiffs' argument here does raise substantial questions. The statute they invoke as specifically prohibiting disclosure is § 709(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e). This statute created the Equal Employment Opportunity Commission, and by its terms applies only to that agency. The Joint Reporting Committee and the OFCC were created by regulations promulgated by the Secretary of Labor pursuant to Executive Order 11246, which, of course, mentions neither a Joint Reporting Committee nor an OFCC. That order purports, at least in part to effectuate the provisions of 42 U.S.C. § 2000e insofar as firms having contracts with the Government are concerned. It is therefore arguable that the ultimate authority for the Joint Reporting Committee and OFCC is 42 U.S.C. § 2000e; that they are alter egos of the EEOC; and that they should be subject to the disclosure restriction of 42 U.S.C. § 2000e-8(e).

Conciliation is the preferred policy for matters coming within the jurisdiction of the EEOC, a policy which is subverted by public disclosure. There would arguably be a circumvention of that policy if defendants were allowed, by virtue of an Executive Order grounded on § 2000e, to set up separate agencies which collected the same or similar data as the EEOC, but which were not bound by restrictions against disclosure. Weighed against this, of course, would be the policy of liberally interpreting the FOIA in favor of disclosure and consequently of narrowly interpreting statutory exemptions. However, it is not at all clear that § 2000e was the basis for Executive Order 11246. Moreover, the existence of Executive Order 10925, 1961 *U.S. Code*

Cong. & Ad. News 1274, promulgated prior to passage of § 2000e, lends support to the argument that Executive Order 11246 has a basis independent of § 2000e, being grounded instead in another statute or in an inherent power of the Executive branch to choose the terms of Government contracts. As stated, though, the decision in this case is not based on the exemptions found in § 2000e-8(e) and 5 U.S.C. § 552(b)(3), and the Court need not decide those issues.

The Court concludes, however, that the disclosure of the EEO-1 and AAP is prohibited by the exemption contained in 5 U.S.C. § 552(b)(4) for matters that are "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ." The Court finds here, from the testimony of Professor Rutenberg, that the parts of the AAP hereafter specified and the EEO-1 contain commercial or financial information which is confidential.[2] While he had not viewed the two documents sought by the intervenors, he was in a position, from his familiarity with the regulations which prescribed the contents of the documents, to evaluate the effect of revelation of those contents. His conclusion was that with this information a competitor could deduce labor costs of the plaintiffs, the most difficult area for a competitor to learn in making strategic decisions. From this can be extrapolated a company's profit margin and resulting vulnerability to price change. Moreover, viewing the same documents over a period of time would enable a competitor to obtain a forewarning on new products

[2] See attached Appendix.

and process changes being undertaken by the plaintiffs. Comparing this testimony with the EEO-1 and AAP in question confirms the witness's conclusion. The Court relies on the testimony as well as on the nature of the material, not the mere claim of the plaintiffs, in determining that confidentiality exists. In reaching the conclusion the Court has followed the purpose of the exemption as set forth in *Bristol-Myers Company* v. *F. T. C.*, 424 F.2d 935, 938 (D. C. Cir. 1970):

> This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers.

In *Sterling Drug Inc.* v. *F. T. C.*, 450 F.2d 698, 709 (D. C. Cir. 1971), the court apparently adopted the standard for coverage by the exemption which was set forth in the Senate Report on the Freedom of Information Act, namely:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes.

S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964). The House Reports add:

> It would also include information which is confidential, since a citizen must be able to confide in

> his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1964).

18 U.S.C. § 1905, which makes it a crime for a governmental official to disclose information if "not authorized by law" to do so, also supports the relief requested by plaintiffs. It can be argued that reliance on this statute begs the question where the Government invokes it to prevent disclosure sought pursuant to FOIA. However, such is not the case where the potentially injured party invokes this statute to prevent the Government from disclosing information to a third party, for this is the precise situation dealt with by § 1905. In view of the finding of confidentiality set forth above, and the relation of the information contained in the documents to processes, operations and profit margins, the statute is clearly applicable here. Cf. *J. I. Case Co.* v. *Borak, supra.*

The defendants argue that the FOIA is authority only for *disclosing* information, not withholding it, and consequently cannot be used as a vehicle to prevent disclosure; that the exemptions are permissive only, being categories of information which *may* be exempt by an agency; and that this is a matter largely committed to agency discretion. The Court rejects this argument. It makes the statutory exemption meaningless and flies in the face of the protective purpose of the exemption as enunciated in the Senate and House Reports quoted above as well as in *Bristol-Myers Co.*

v. *F. T. C., supra.* The Court recognizes that that case, like most of the others arising under the FOIA, involved an instance where a plaintiff sought and the governmental agency contested disclosure. This does not mean, however, that a plaintiff which the exemption is designed to protect may not properly invoke that exemption where disclosure is threatened.

Insofar as being committed to agency discretion is concerned, the disclosure portion of the regulations itself recognizes an exemption of confidential information, with and without reference to the FOIA. 41 CFR § 60-40.3. The FOIA cannot permit agency discretion to the extent that such discretion precludes *de novo* determination by a court of the entitlement to an exemption under FOIA.

Plaintiffs also contend that the materials in question are "investigatory files" within the meaning of 5 U.S.C. § 552(b)(7). However, the purpose of that exemption is only "to prevent premature discovery by a defendant in an enforcement proceeding," *Wellford* v. *Hardin*, 444 F.2d 21, 23 (4th Cir. 1971), and it is inapplicable to the facts of this case.

Nor does the Court conclude that the defendants are bound by language of confidentiality which plaintiffs read into the receipts for the AAPs signed by the Contract Compliance Officers. These seem no more than an attempt by plaintiffs to assert their ownership of the documents, an attempt pursued at trial. The ownership of the documents, however, is not determinative of the outcome of this case.

In view of the foregoing, reviewability of the agencies' action under the Administrative Procedure

Act, 5 U.S.C. § 701, *et seq.*, and whether that action can stand under the standard of review of the Act need not be considered.

The Court accordingly concludes that that part of the EEO-1 (Exhibit A) filed by Westinghouse which is under the heading "Section D—EMPLOYMENT DATA" may not be disclosed and that only that part of the AAP (Exhibit C) which appears in Exhibit B may be disclosed.

Plaintiffs have requested a declaratory judgment that disclosure of *any* EEO-1 reports or AAPS of plaintiffs is prohibited. This is further relief than the Court feels is warranted. The Court holds no more here than that certain portions of two specific documents which the Court has had the opportunity to examine must not be disclosed. The requested declaratory relief would necessarily cover information yet to be prepared which may or may not be confidential in nature.

A decree enjoining defendants from disclosure other than in accordance with the foregoing should be prepared by counsel for the plaintiffs and presented for entry after submission to counsel for defendants and intervenors for approval as to form.

ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
April 2nd, 1974

"BY MR. DRIVER:

Q. Dr. Rutenberg, in referring to the EEO1 report, if you would look at it, please, sir, and from the breakdown of that report are you able in your area of knowledge to come up with opinions as to the work force and corporate vulnerability of a company?

A. Definitely, yes.

Q. All right.

A. With this information, this is the most—the area of information is the most difficult to get in making strategic decisions. This is the area of the cost, the variable cost, which is primarily employee cost broken down in a lot of detail. There are nine categories here.

Q. All right, sir. With that information, what might you in corporate planning or strategic deduce about a company's competitive position?

A. Okay. From this information I can—with this information, knowing where the facility is, I can get the wage rates from competitive indices, from employment services and so on.

From this I can infer the labor cost of the facility. Knowing the labor cost—the cost of the product is based on the labor cost plus the material cost. If I know that, and the material cost is gettable by what is called volume analysis and purchasing and engineering design. If I know those two components, I then know the facility's profit margin. I can get that information fairly readily.

With the material in the affirmative action program,

I have such detail I can get a very precise fix on the variable manufacturing cost per unit, and from this the profit margin per unit of this facility.

If I am a competitor, I can then think through the effect—and particularly if I am a dominant competitor—I can think through the effect of a price change on the existence of this facility. This is a competitive vulnerability of this facility to a price change.

Q. Take, for example, over a period of years, if you have had three or four such documents and you start either a reduction or an increase in a certain employee's category and you could pick one based on that form, tell the Court what that might indicate to you.

A. Let's consider the question of professionals. In the affirmative action program, this is broken down into a lot of categories.

One that I was looking at has 23 categories. Another has about 18.

If I can watch the number of senior design engineers through time, and I can watch this buildup, I can then get a very good clue that it is very likely that this facility, they are developing new products or new processes—I don't know which at this time.

If I watch a number of maintenance workers, then I can get a very good idea, broken down, again, in fine detail, in the affirmative action program, I can get a good idea whether it is a new process they are working on or new product development, and from this I can get a good forewarning as to what a competitor, what moves a competitor will be making.

If I am not engaged in similar kinds of research, I can immediately start doing so, and this is a fairly

common practice, to have—in essence, strive for some forewarning of a competitor's process, of a competitor's product.

If I can get that kind of information, I can embark on my own catch-up research, and it is relatively easy; why, because it is possible to hire, to job interview from the competitor, to hire a few people, to canvass suppliers, to try to get a clue to what it is exactly that they are buying that is unusual from their previous buying patterns, and in this way my catch-up research may even be cheaper than the first person's research."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES STEEL CORPORATION, PLAINTIFF *v.* JAMES R. SCHLESINGER, *Secretary, etc. et al.*, DEFENDANTS	Civil Action No. 183-74-A
GENERAL MOTORS CORPORATION, PLAINTIFF *v.* JAMES R. SCHLESINGER, *Secretary, etc., et al.*, DEFENDANTS	Civil Action No. 195-74-A

MEMORANDUM OPINION

The law and facts here presented are identical for all practical purposes with those presented to Judge Albert V. Bryan, Jr. in Westinghouse Electric Corporation, et al. versus James A. Schlesinger, et al., Civil Action No. 118-74-A, this court.

Had the undersigned known that Judge Bryan had Westinghouse under consideration, he would not have heard these cases—The judges of this division rarely

hear a case involving the same issues of law and fact just heard and determined by the other resident judge.

Fortunately no harm has resulted from my hearing and determining these cases—Although I did not read Judge Bryan's opinion in Westinghouse until after I had heard the testimony and argument of counsel in these cases, I am pleased to announce that we have reached the same conclusion. Judge Bryan's memorandum opinion in Westinghouse is adopted in toto and made a part hereof by reference.

Section 552(b)(4) of the Freedom of Information Act specifically exempts from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential.

This Court finds from the evidence presented that the AAPs and EEO-1s in question contained confidential commercial or financial information which would not customarily be released to the public by the corporate plaintiffs, and that such information would be of substantial value to the plaintiff's competitors in performing cost-pricing analyses of plaintiffs' pricing practices, in monitoring plaintiffs' development of new products and processes, in identifying plaintiffs' customers in their consumption needs, in analyzing plaintiffs' production by product line, and in developing competitive bidding strategies to be used against the plaintiffs; and that disclosure of this information would both impair the Government's ability to obtain necessary information for its administration of the Executive Orders and Title 7 of the Civil Rights Act and would cause substantial harm to the competitive position of the plaintiffs.

The Government tacitly concedes that some of the information in the plaintiffs' AAPs and EEO-1 is not disclosable because they have agreed to delete the names of any particular employees—all wage data or salary rates—any promotion analyses which tend to identify an individual employee—any projections of hiring or lay-off rates which indicate substantial changes in business patterns—and any and all reasons for termination which tend to identify individual employees.

They say, however, that the designated government administrative officer has the sole responsibility under the Freedom of Information Act of determining whether the requested documents—AAPs and EEO-1s or any portions thereof—are disclosable; that Court review, if any, is limited to review for abuse of discretion.

The courts not the Executive Branch have the last word in such matters. See United States v. Nixon, etc., No. 73-1766 (July 24, 1974), —— U.S. ——.

The Government further says that the FOIA exemptions are neither mandatory nor available to the plaintiffs in opposing disclosure—Only the Government may use the exemptions to justify nondisclosure—They cite no authorities to support these contentions. This argument is without merit.

Although the FOIA makes disclosure the rule and secrecy the exception, the Fourth Circuit has long recognized the specific exemptions mentioned therein. See Sears versus Gottschalk, Commissioner of Patents, No. 73-1699, decided August 14, 1974, and the cases cited therein on page fifteen.

Upon the record here made, this Court holds that the

§ 552(b)(4) exemption of the Freedom of Information Act bars disclosure of the confidential commercial or financial information contained in the plaintiffs' AAPs and EEO-1s by the Defense Supply Agency or any other branch of the United States government without the consent of the plaintiffs first had and obtained.

If the parties cannot agree amongst themselves which portions of the documents in question are non-disclosable under the findings here made, each should submit to the Court within the next thirty days a copy of the AAPs and EEO-1s so marked—The Court will then determine which portions, if any, of the said documents may be disclosed.

In the interim the Government may not release any of the requested information.

The requested declaratory relief covering all past and future AAPs and EEO-1s is not warranted—It will be denied.

The Clerk will send a copy of this memorandum opinion to all counsel of record.

OREN R. LEWIS
United States Senior Judge

September 20, 1974

A True Copy: Teste:
W. Farley Powers, Jr., Clerk
By Doris R. Casey
Deputy Clerk

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1801

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

versus

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR,

APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA COUNTY, AND COUNCIL ON ECONOMIC PRIORITIES,

INTERVENOR-DEFENDANTS.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

William K. Slate, II
Clerk

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2048

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES R. SCHLESINGER, U. S. DEPARTMENT OF DEFENSE; WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIES, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, DEFENDANT-INTERVENORS.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

William K. Slate, II
Clerk

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1269

UNITED STATES STEEL CORPORATION, APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

APPELLANTS,

NATIONAL ORGANIZATION FOR WOMEN AND CONSUMER FEDERATION OF AMERICA,

AMICUS CURIAE.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

William K. Slate, II
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1271

GENERAL MOTORS CORPORATION,

APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

APPELLANTS.

NATIONAL ORGANIZATION FOR WOMEN AND CONSUMER FEDERATION OF AMERICA,

AMICUS CURIAE.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

William K. Slate, II
Clerk

APPENDIX E

STATUTES AND REGULATIONS

The Freedom of Information Act, 5 U.S.C. 552, as amended by Pub. L. 93-502, 88 Stat. 1562, and Pub. L. 94-409, 90 Stat. 1247, provides in pertinent part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

* * * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether

such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld * * *;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * *

18 U.S.C. 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person,

firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The OFCC disclosure regulations, 41 C.F.R. Part 60-40, provide in pertinent part:

Subpart A—General

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

§ 60-40.2 Information available on request.

(a) Upon the request of any person for identifiable

records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-10.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are

exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) These portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) These portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related docu-

ments, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

§ 60-40.4 Information disclosure of which is prohibited by law.

The Standard Form 109 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e)

of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

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